

(A)  
No. 93-908-CSX  
Status: GRANTED

Title: Charles J. Reich, Petitioner  
v.  
Marcus E. Collins, Revenue Commissioner of Georgia,  
et al.

Docketed:

December 8, 1993

Court: Supreme Court of Georgia

Counsel for petitioner: Henson, Carlton M.

Counsel for respondent: Calvert, Warren R.

Entry	Date	Note	Proceedings and Orders
1	Dec 8 1993	G	Petition for writ of certiorari filed.
5	Jan 4 1994	D	Motion of petitioner to expedite consideration of the petition for writ of certiorari filed.
3	Jan 6 1994		Brief amicus curiae of The Military Coalition filed.
2	Jan 7 1994		Brief amicus curiae of National Association of Retired Federal Employees filed.
10	Jan 7 1994	X	Brief amici curiae of Designated Retirees in Kansas, New York and Oklahoma filed.
4	Jan 10 1994		DISTRIBUTED. January 14, 1994 (Page 18)
6	Jan 10 1994	X	Brief of respondents Marcus Collins, et al. in opposition filed.
7	Jan 12 1994		REDISTRIBUTED. February 18, 1994 (Page 2)
8	Jan 12 1994	X	Reply brief of petitioner Charles Reich filed.
9	Jan 18 1994		Motion of petitioner to expedite consideration of the petition for writ of certiorari DENIED.
11	Feb 22 1994		Petition GRANTED. limited to Question 1 presented by the petition. *****
13	Mar 17 1994		Order extending time to file brief of petitioner on the merits until April 15, 1994.
14	Apr 15 1994		Brief of petitioner Charles Reich filed.
15	Apr 15 1994		Joint appendix filed.
16	Apr 15 1994		Brief amicus curiae of Tax Executives Institute, Inc. filed.
17	Apr 15 1994		Brief amici curiae of National Association of Retired Federal Employees, et al. filed.
18	Apr 15 1994	G	Motion of James B. Beam Distilling Co. for leave to file a brief as amicus curiae filed.
19	Apr 15 1994		Brief amicus curiae of Committee on State Taxation filed.
21	Apr 21 1994		Order extending time to file brief of respondent on the merits until May 25, 1994.
22	Apr 26 1994		Opposition of respondents to motion of James B. Beam Distilling Co. for leave to file a brief as amicus curiae filed.
23	May 2 1994		Motion of James B. Beam Distilling Co. for leave to file a brief as amicus curiae GRANTED.
28	May 24 1994		Brief amicus curiae of North Carolina filed.
24	May 25 1994		Brief amici curiae of National Governors' Association, et al. filed.
25	May 25 1994		Brief amici curiae of Alabama, et al. filed.
26	May 25 1994		Brief of respondents Marcus Collins, et al. filed.
27	May 26 1994		Lodging consisting of brief in opposition of the state of Georgia filed in case no.93-1140.

2/94

No. 93-908-CSX

Entry	Date	Note	Proceedings and Orders
29	Jun 27 1994	Reply brief of petitioner filed.	
30	Jul 12 1994	CIRCULATED.	
31	Jul 20 1994	SET FOR ARGUMENT TUESDAY, OCTOBER 11, 1994. (3ND CASE).	
32	Aug 5 1994	Record filed.	
		* Original record proceedings Supreme Court of Georgia and Clayton County Superior Court. (BOX)	



93-908

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

DEC - 8 1993

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In The  
**Supreme Court of the United States**

October Term, 1993

—◆—  
CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS AND THE GEORGIA  
DEPARTMENT OF REVENUE,

*Respondents.*

—◆—  
**Petition For Writ Of Certiorari  
To The Supreme Court Of Georgia**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
CARLTON M. HENSON  
Counsel of Record

McALPIN, HENSON & KEARNS  
Eleven Piedmont Center  
Suite 400  
3495 Piedmont Road  
Atlanta, GA 30305  
(404) 239-0774

## QUESTIONS PRESENTED

1. Whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity.

2. Whether a state may collect taxes from its citizens in violation of the Constitution, provide a right to refunds for the unconstitutional taxation, and then eliminate the right to refunds after the time has passed for any other relief.

## **PARTIES**

The parties to this proceeding are the Petitioner, Charles J. Reich, and the Respondents, Marcus E. Collins, Sr. (Georgia Revenue Commissioner) and the Georgia Department of Revenue.

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NO.: \_\_\_\_\_

THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CHARLES J. REICH, PETITIONER, V.  
MARCUS E. COLLINS and THE GEORGIA  
DEPARTMENT OF REVENUE, RESPONDENTS

On Petition for Writ of Certiorari to  
the Supreme Court of Georgia

**PETITION FOR WRIT OF CERTIORARI**

Charles J. Reich hereby petitions this Court for a  
Writ of Certiorari to the Supreme Court of Georgia.

## OPINIONS BELOW

The December 2, 1993 opinion of the Supreme Court of Georgia in *Reich v. Collins II*, Ga. S.Ct. No. S92A0621 ("*Reich II*") (Appendix A) is reported at \_\_\_ Ga. \_\_\_, \_\_\_ S.E.2d \_\_\_ (1993). *Reich v. Collins I* ("*Reich I*"), decided November 19, 1992 (Appendix D) and the order denying Motions for Reconsideration in *Reich I* are reported at 262 Ga. 625, 422 S.E.2d 846 (1992). This Court's decision (Appendix B) vacating and remanding *Reich I* is reported at 509 U.S. \_\_\_, 113 S.Ct. 1325 (1993). The decision of the trial court (Appendix E) is unpublished.

## JURISDICTION

The decision of the Georgia Supreme Court was entered on December 2, 1993. This Petition is filed within the time allowed by law, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES

### Amendment 14, Section 1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 48-2-35(a)<sup>1</sup>

A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner.

O.C.G.A. §§ 48-2-59, 50-3-13, 50-3-19, 50-3-20 are set forth in Appendix G.

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<sup>1</sup>Full text of O.C.G.A. § 48-2-35 is Appendix G.

## STATEMENT

This is the second appearance of this case before this Court. Last term, this Court vacated *Reich I* and remanded for further consideration in light of *Harper v. Virginia Dept. of Treasury*, 509 U.S. \_\_\_, 113 S.Ct. 2510 (1993), *Reich v. Collins*, 509 U.S. \_\_\_, 113 S.Ct. 1325 (1993) (Appendix B).

On remand, the Georgia Supreme Court concluded that, "there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax." *Reich II*, slip op. p. 4 (Appendix A, p. 5). The Georgia court concluded that Petitioner was not entitled to refunds under due process, and that court implicitly held that Georgia's refund statute did not allow refunds.

Before its amendment in September 1989, former O.C.G.A. § 48-7-27 exempted from state income taxation retirement benefits paid to state retirees while offering no exemptions for federal retirement benefits. In March 1989, this Court held that a similar exemption scheme in Michigan was illegal under 4 U.S.C. § 111 and the doctrine of intergovernmental immunity. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989). Following *Davis*, state officials in Georgia advised retirees to file refund claims under O.C.G.A. § 48-2-35 by filing amended returns. Acting on this advice and the publicity surrounding *Davis*, almost 40,000 federal retirees, including Petitioner, filed refund claims. The refund statute was established

Georgia law, and it provided unqualified refunds within the three year limitation period of the statute.

The refund statute provided, however, that claimants had to wait a year from the filing a claim with the Revenue Department to file suit. Because of this and the state's announced position that taxes on retirement income for 1988 were still due and payable on April 17, 1989, three lawsuits were filed in Georgia seeking relief from the illegal and unconstitutional taxation. All three suits were dismissed, at least in part, because of the existence of O.C.G.A. § 48-2-35. In *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), the plaintiff sought declaratory relief and equitable relief in the form of an escrow fund for the accumulation of taxes paid after *Davis*. The Georgia Supreme Court dismissed the action as moot in view of the legislature's September 1989 amendment of the offending statute. With regard to the escrow of taxes collected after *Davis*, the Georgia Supreme Court held that the refund statute provided an adequate remedy at law obviating the need for equitable relief. 259 Ga. at 583, 385 S.E.2d at 75, n. 1.

Another group of retirees filed suit in U.S. District Court for the Northern District of Georgia. This case was dismissed on jurisdictional grounds pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The trial court held that Georgia's remedial scheme, including in particular O.C.G.A. § 48-2-35, provided a plain, speedy and efficient remedy. *Wetzel v. Collins*, USDC, ND Ga. No. 1:89-CV-758-ODE, Order of September 26, 1990.



Finally, Petitioner and two other retirees also filed a suit for injunctive and declaratory relief in state court. After the Georgia Supreme Court's decision in *Collins*, that suit was dismissed by the trial court because the plaintiffs had not followed the procedural requirements of O.C.G.A. § 48-2-35. (Appendix F).

After this dismissal, and once Petitioner became eligible under the refund statute to file suit, he initiated this action challenging Georgia's tax scheme and seeking refunds of illegally collected taxes. This case has become the test case for Georgia retirees seeking relief in the wake of *Davis*.

The trial court found that the Georgia tax scheme was unconstitutional and illegal under *Davis*. The trial court also held that the refund statute, O.C.G.A. § 48-2-35, applied and that it barred claims for refunds before 1985. The trial court concluded that no refunds were due because *Davis* could not be applied retroactively based on *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971) (Appendix E).

On appeal, the Georgia Supreme Court reversed the trial court and held that *Davis* must be applied retroactively, relying on *James B. Beam Distilling Co. v. Georgia*, 501 U.S. \_\_\_, 111 S.Ct. 2439 (1991). Nevertheless, the Georgia Supreme Court went on to hold that Petitioner was not entitled to any relief, holding for the first time that Georgia's refund statute does not apply to an unconstitutional or illegal tax. That court further held, without authority, that a taxpayer must have made a demand for refund at the time the tax was paid in order to recover an unconstitutional or illegal

tax. *Reich v. Collins I*, 262 Ga. 625, 422 S.E.2d 846 (1992) (Appendix D). The questions sought to be reviewed here were first raised by that decision, and Petitioner's Motion for Reconsideration was denied. (Appendix C). Petitioner promptly filed a Petition for Writ of Certiorari to this Court.

As noted, this Court vacated and remanded for review in light of *Harper*, and the Georgia Supreme Court has continued to deny any relief to federal retirees. On the same day it issued *Reich II*, the Georgia Supreme Court also issued its second decision in *James B. Beam Distilling Co. v. Georgia*, Ga. S.Ct. Nos. S93A1217, S93A1218 (December 2, 1993) ("*Beam II*"). Also for the second time, it denied relief to the taxpayer.

## REASONS FOR ALLOWING THE WRIT

Ultimately, this case is about federalism. Twice, this Court has remanded cases to the Georgia Supreme Court with directions to follow the standards of due process in considering the appropriate remedy for citizens subjected to unconstitutional taxation. In addition to *Reich I*, this Court reversed and remanded in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. \_\_\_, 111 S.Ct. 2439 (1991). Twice, the Georgia Supreme Court has ignored the mandates of this Court and has denied due process or any kind of relief. *Reich v. Collins II*, *supra*, (Appendix A), *James B. Beam Distilling Co. v. Georgia II*, *supra*. If certiorari is not

granted in this case, then the minimum federal requirements of due process in Georgia will be zero.

Allowing the decision below to stand will also signal to other states that they have a free hand to impose discriminatory taxes, illegal taxes, and unconstitutional taxes, because the states will know the only risk they face is the repeal of the offending statute.

Further, this case will affect thousands of federal retirees in Georgia, and there are *Davis* cases still pending in Kansas, Mississippi, New York, North Carolina, Oklahoma, Utah, Virginia, and Wisconsin.<sup>2</sup> These cases also involve the due process and remedy issues presented here, and this Court will invite inconsistent and confusing results unless it provides definitive guidance in this case.

By definition, the people affected by *Davis* are retirees. In the four terms since *Davis*, this Court has repeatedly addressed issues relating to *Davis*.<sup>3</sup> Still, in at least ten states, there has been no final resolution. Retirees

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<sup>2</sup>Since *Harper*, the Supreme Court of Iowa has issued a final ruling in favor of retirees. *Hagge v. Iowa Dept. of Rev. & Finance*, 504 N.W.2d 448 (1993). Also, since *Harper*, settlements involving refunds have been reported in Arizona, Arkansas, Montana and South Carolina.

<sup>3</sup>*James B. Beam Distilling Co. v. Georgia*, 501 U.S. \_\_\_, 111 S.Ct. 2439 (1991); *Harper v. Virginia Dept. of Treasury*, 501 U.S. \_\_\_, 111 S.Ct. 2881 (1991); *Bass v. South Carolina*, 501 U.S. \_\_\_, 111 S.Ct. 2883 (1991); *Barker v. Kansas*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1619 (1992); *Harper v. Virginia Dept. of Treasury*, 509 U.S. \_\_\_, 113 S.Ct. 2510 (1993).

continue to age, and many have died since *Davis*. The two issues presented here, the adequacy of predeprivation remedies and the impact of statutory refund rights, appear in some form in most of the other states. Resolving these issues will conclude the litigation for the majority of retirees, and it will complete the equation that includes *Davis*, *McKesson* and *Harper*.

#### I. GEORGIA HAS NOT PROVIDED ITS INCOME TAXPAYERS A PREDEPRIVATION REMEDY FREE OF DURESS.

Georgia must provide federal retirees meaningful backward looking relief or a predeprivation remedy without duress for taxpayers challenging an illegal or unconstitutional tax. *Harper*, slip op. pp. 12-14; *McKesson*, 496 U.S. at 36-40, 110 S. Ct. at 2250-2252. Without "duress" means that the prepayment procedure must be free of "financial sanctions" designed "to prompt" or "to encourage" taxpayers to tender tax payments before their objections are entertained and resolved. *Harper v. Virginia Dept. of Taxation*, slip op. pp. 12-13, n. 10 (1993); *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. at 32-38, 110 S. Ct. at 2248-51, n.21 (1990). Not only must these remedies be free of duress, these remedies must also be "clear and certain." *McKesson*, 496 U.S. at 32, 39, 41, 50, 110 S. Ct. at 2248, 2251, 2258. None of the Georgia procedures pass muster under *McKesson* or *Harper*.

The Georgia Supreme Court decision in this case defies logic. That court found that declaratory judgment and injunctive relief were available to Petitioner as predeprivation remedies. *Reich II*, slip. op., p. 3 (Appendix A, p. 4). In *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), though, federal retirees with *Davis* claims sought this exact and precise relief; the Georgia Supreme Court refused that relief. The court ruled that declaratory relief was moot because the offending statute had been amended, and it ruled that injunctive relief in the form of an escrow fund was not proper because Georgia's refund statute provided an adequate remedy at law.

In this case, the Georgia Supreme Court cites *Beam II*, slip. op., p. 8, which in turn relies on *State v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988), for the proposition that declaratory and equitable relief were available. In *Collins*, the retirees also relied on *Private Truck*. Even though the Georgia Supreme Court denied that relief to federal retirees in *Collins* four years ago, it now says that that relief was in fact available.

The Georgia Supreme Court actually takes this absurdity one step further. In addition to the retirees in *Collins*, Petitioner himself filed a suit with two other retirees for equitable and declaratory relief. After *Collins* was decided, that suit was dismissed because petitioner had failed to follow the procedural requirements of the refund statute. (Appendix F). The Georgia Supreme Court now chastises Petitioner for not appealing that decision. *Reich II*, slip op.



p. 4 fn. 4. (Appendix A, p. 4). By the time of that dismissal, though, the Court had already decided *Collins* and had already held that federal retirees were not entitled to declaratory relief or equitable relief. Plainly, any appeal would have been useless.<sup>4</sup> These remedies were not clear and certain nor did they provide a meaningful opportunity to challenge the tax in a predeprivation hearing.

The *Reich II* majority next claims that there was a predeprivation remedy available under Georgia's Administrative Procedure Act (O.C.G.A. § 50-13-12), but no agency, not even the Department of Revenue, has the authority to strike or render void a tax statute. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975); see also *George v. Department of Nat'l Resources*, 250 Ga. 491, 299 S.E.2d 556 (1983). Thus, the resort to administrative review also would have been completely useless; a taxpayer seeking to void a tax statute as unconstitutional could not obtain that relief under the Administrative Procedure Act. As the Georgia Supreme Court has held, such a challenge would have been "futile at the time of its making." *Flint River Mills*, *supra*, 234 Ga. at 386, 216 S.E.2d at 897. Again, the availability of a "futile" challenge does not satisfy *McKesson* and *Harper*.

The Georgia court also cites O.C.G.A. § 48-2-59 as providing a taxpayer the right of appeal of an assessment

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<sup>4</sup>Had Petitioner filed an appeal, the Georgia Supreme Court could have exercised its right to assess a penalty for frivolous appeal. (Georgia Supreme Court Rule 14).

directly to superior court without the necessity of an administrative hearing. (*Reich II*, slip op. p. 4) (Appendix A, p. 5). Subsection (c) of this statute provides, however, that in order to secure review by the superior court, the taxpayer must file a surety bond or other security conditioned to pay the disputed tax if it is found to be due together with interest and costs. The surety posting the bond will require a substantial fee and some type of security from the taxpayer, with the result that some real or personal property of the taxpayer will be encumbered pending the outcome of the litigation. The only other alternative is if the taxpayer owns property in Georgia, but this is subject to fieri facias.

Requiring the taxpayer to post a security equal to the tax is almost as onerous as requiring payment of the tax. A surety bond or other security are immediate and substantial property interests. Thus, this procedure is not in any sense a predeprivation procedure at all because it immediately deprives the taxpayer of a property interest approximately equal to the tax. Rather, as the dissent in *Reich II* noted, "it is clear to me that Georgia has established 'various and summary remedies designed so that [taxpayers] tender tax payments before their objections are entertained and resolved. As a result, [Georgia] does not purport to provide taxpayers like [appellant] with a meaningful opportunity to withhold payment and to obtain a predeprivation determination' of the tax assessment's validity . . . ." (Emphasis in original). *McKesson v. Div. of Alcoholic*

*Beverages and Tobacco, supra* at 38 (III)(B)." *Reich II*, slip op. p. 7 (Appendix A, p. 12).

The thrust of the decision of the Georgia Supreme Court is that all these remedies were clear and certain and that Petitioner was simply mistaken in following the refund statute. The court offers no explanation why, if these other remedies were so clear and certain, officials of the Revenue Department were actively telling retirees to file amended returns setting forth their refund claims. The court offers no reason why, if declaratory and injunctive relief were available, the court denied this same relief to federal retirees four years ago.

Furthermore, the acceptability of any of these proposed remedies under *McKesson* and *Harper* also fails because of the duress of criminal and financial sanctions. To trigger any of these procedures, a retiree must first refuse to pay the tax and await assessment, levy or execution. In Georgia, any taxpayer who fails to pay income tax is subject to a penalty equal to 25% of the tax,<sup>5</sup> interest at the rate of 12% per annum,<sup>6</sup> and criminal prosecution.<sup>7</sup> "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real personal property, the tax is paid 'under duress' in the sense that the State has not

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<sup>5</sup>O.C.G.A. § 48-7-86.

<sup>6</sup>O.C.G.A. § 48-2-40.

<sup>7</sup>O.C.G.A. §§ 48-7-2, 48-16-12(b).

provided a fair and meaningful deprivation procedure." *McKesson*, 496 U.S. at 38, 110 S. Ct. at 2251, n.21 (emphasis added). A penalty of 25% and interest at 1% per month are Draconian sanctions for retirees living on pensions. For retirees, the possibility of criminal prosecution is frightening. The majority in *Reich II* completely ignores these sanctions.

The Commissioner has argued that these financial sanctions do not really count because he has discretion to waive the penalty if the failure to pay was due to "reasonable cause" and not due to "willful neglect." O.C.G.A. §§ 48-2-43, 48-7-86(a)(2). For a taxpayer considering a constitutional challenge, there is absolutely no standard as to what is "reasonable cause" or "willful neglect." As the Georgia Supreme Court held in *Gainesville-Hall County Economic Opportunity Org., Inc. v. Blackmon*, 233 Ga. 507, 508, 212 S.E.2d 341, 343 (1975), "[a] taxpayer who chooses [the administrative] remedy . . . is subject to the discretion of the commissioner and/or reviewing court as to whether collection procedures will be stayed." For the taxpayer, the risk and the duress of financial sanctions are always present.

In this case, Petitioner mounted a bona fide, good faith, and reasonable challenge to the disparate tax treatment of federal and state retirees. Two years ago he won on the basic issue of the illegality of the tax. Still, he faces penalty and interest. Since April, 1989, Petitioner has faced 55 months at 1% per month plus the 25% penalty. Thus, he potentially faces an exposure equal to 180% of the tax due,

and this number is still increasing. Despite three years of litigation, the Commissioner has not withdrawn the penalty and interest sought on Petitioner's assessment. If a taxpayer is subject to the penalty under these circumstances, it is absurd to suggest that the penalty is not real. Without any other factors, the 25% penalty and 55% interest constitute financial sanctions that make any prepayment procedure subject to duress.

Here, though, there is another factor: the threat of criminal prosecution. This sanction sets this case above and beyond any case decided to date. Every taxpayer in Georgia who fails to pay income tax faces the ultimate sanction of prosecution and conviction as a criminal. O.C.G.A. §§ 48-7-2, 48-16-12.

This risk is present regardless of the intentions of the Commissioner. For a taxpayer considering a challenge, not paying the contested tax always creates the risk that some prosecutor will pursue criminal prosecution. The only clear and certain way to avoid this risk is to pay the tax. The Commissioner has argued that this risk of criminal prosecution does not count because only an official acting unreasonably or in bad faith would use this threat. But O.C.G.A. § 48-2-81 imposes the following duty on law enforcement officials:

It shall be the duty of all tax collectors, tax commissioners, sheriffs and constables to make sure that all persons violating any tax



laws of this State are prosecuted for all such violations.

Moreover, criminal prosecution is not unreasonable when the taxpayer's refusal to pay is based on frivolous objections. A State official who honestly believes the objections are frivolous and who prosecutes for failure to pay has not acted in bad faith. Yet the taxpayer has no way of knowing if State officials will regard the objections as bona fide or frivolous. *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) illustrates this problem. There, the taxpayer actually faced the threat of criminal prosecution even though his objections to the tax were bona fide and made in good faith. The Commissioner did not think much of the objections, and threatened prosecution. "Encouraged" by this threat, the taxpayer paid the tax.

While it may be true that the Commissioner has decided not to prosecute some taxpayers in the past, that does not remove the risk of prosecution contained in O.C.G.A. §§ 48-7-2, 48-16-12(b). As the taxpayer in *Wright* experienced, it is this risk of prosecution that creates the duress. *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286, 32 S. Ct. 216, 217 (1912).

Criminal prosecution, interest and a 25% penalty are not the only sanctions Georgia taxpayers face. The assessment procedure itself is wholly within the discretion of

the Revenue Commissioner.<sup>8</sup> The State has available additional remedies of levy, garnishment, and attachment.<sup>9</sup> None of these remedies available to the State are precluded by a protest or other taxpayer objections.<sup>10</sup> As the dissent in *Reich II* noted, these sanctions require a conclusion that Petitioner's payment of the unconstitutional taxes was not made "voluntarily," but was made under duress. (*Reich II*, slip op. p. 8; Appendix A, p. 14). Accordingly, these remedies do not satisfy due process.

Finally, the clear and certain standard of *McKesson* is not met because Georgia, like several other states,<sup>11</sup> has a refund statute that provides an unqualified right to refunds of illegal taxes. While neither *Harper* nor *McKesson* specifically address this circumstance, the clear and certain standard is violated when a state provides an attractive post-deprivation remedy and then eliminates it after the time for other relief has expired. As discussed in Part II, *infra*, the

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<sup>8</sup>O.C.G.A. § 48-2-46.

<sup>9</sup>O.C.G.A. § 48-2-55.

<sup>10</sup>As if these penalties were not severe enough, the legislature has recently authorized an additional penalty of 50% and criminal prosecution as a felony. O.C.G.A. §§ 48-16-10(b), 48-16-12. Both of these new sanctions are "in addition to all other penalties" provided by law.

<sup>11</sup>See e.g., *N.Y. Tax Law* § 686; *Va. Code Ann.* § 58.1-1826.

post-deprivation remedy is a property right, and its elimination is itself a due process violation.

Whether or not it is a property right, though, the presence of the refund remedy imposed a remedy roulette on retirees. Regardless of the merit of any other remedy, the purported availability and attractiveness of the refund statute made Georgia's entire remedial scheme unclear and uncertain. Retirees were required to choose from several apparent remedies. Once their choices were made, they were fixed, and the remedy roulette wheel began to spin. If they placed their bets on the "wrong" remedy, they lost the gamble, the illegal tax and any right to relief. The clear and certain mandate of *McKesson* is not met under these circumstances.

In Georgia, by far the most attractive remedy was the refund statute because the retiree taxpayer avoided penalties, interest, and the risk of criminal prosecution. *Davis* was decided on March 28, 1989. Taxes for 1988 were not due until April 17, almost three weeks later. Despite *Davis*, the State announced that unpaid taxes on retiree income for 1988 were still due and owing. In that three week period, thousands of federal retirees filed refund claims. None ever sought administrative review. None ever sought review in superior court. The few retirees who sought declaratory and injunctive relief were defeated. These facts defy any finding that these remedies were clear and certain.

## II. A STATE MAY NOT COLLECT TAXES FROM ITS CITIZENS IN VIOLATION OF THE CONSTITUTION, PROVIDE A RIGHT TO REFUNDS FOR THE UNCONSTITUTIONAL TAXATION, AND THEN ELIMINATE THE RIGHT TO REFUNDS AFTER THE TIME HAS PASSED FOR ANY OTHER RELIEF.

For more than 50 years, Georgia's refund statute, O.C.G.A. § 48-2-35, has provided an unqualified right to refunds of taxes "illegally assessed and collected." As noted, other states have similar statutes. Despite extensive briefing by both parties, the decision of the Georgia Supreme Court in this case completely ignores this statute. Without discussion, the court simply refuses Petitioner the remedy provided in this statute. When a state provides its citizens a remedy for unconstitutional taxation and then eliminates that remedy after the time has run for any other relief, it violates due process. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451 (1930).

*Brinkerhoff* is closely analogous to the present case. In *Brinkerhoff*, the taxpayer brought an equitable action against a Missouri county for discriminatory taxation. The state answered that equitable relief was not available because the taxpayer had not pursued its administrative remedy. The Missouri Supreme Court agreed, found that the plaintiff was guilty of laches in failing to pursue that remedy, and held that the plaintiff was not entitled to relief. The problem was

that Missouri law had until that point held that the administrative commission did not have power to grant relief from the kind of discrimination that was alleged.

This Court reversed because the plaintiff had been denied due process: "The possibility of the relief before the tax commission was not suggested by anyone in the entire litigation until the [Missouri] Supreme Court filed its opinion . . . . Then it was too late for the plaintiff to avail itself of the newly found remedy." *Id.* at 453.

Here, no one ever suggested to Petitioner that the refund statute was unavailable until the decision of the Georgia Supreme Court in November 1992. The state never pled or argued that the refund statute did not apply. Indeed, the state successfully argued to the trial court that it did apply to Petitioner to bar claims before 1985.

While the Georgia Supreme Court now says Petitioner should have sought declaratory and equitable relief, four years ago it said that relief was unavailable. *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989). When Petitioner sought this relief, he was also told it was unavailable and that he had to follow the refund statute. Just like the court in *Brinkerhoff*, the Georgia Supreme Court has played a remedy shell game to preclude any relief for Petitioner.

Moreover, *Brinkerhoff* is not alone in holding that state enacted remedies can create property interests protected by due process. See also, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985); *Logan v.*

*Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982).

There can be no genuine dispute that, until Reich I, it was settled Georgia law that the refund statute provided relief for illegal and unconstitutional taxes. The legislative history of O.C.G.A. § 48-2-35 establishes that the original intent of the statute was to provide refunds of taxes paid into the State Treasury under laws that were later declared unconstitutional. The statute was originally enacted on January 3, 1938, Ga. L. Ex. Sess. 1937-38, pp. 77, 94-95. The statute was prompted by an Executive Report to the General Assembly from the Governor, Eugene Talmadge. In his report, Governor Talmadge stated:

I am attaching a file, marked Exhibit A, which is made a part of this report, showing certain taxes that have been paid into the state treasury under laws that have since been declared unconstitutional. There is no provision, without an act of the legislature, to pay these taxes to these debtors of the state who have paid these unconstitutional taxes. This is a moral obligation of the state.

1 H.J. 1937, 565, reported at *Eibel v. Forrester*, 195 Ga. 439, 441, 22 S.E.2d 26, 27 (1942).



At least as early as *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the Georgia Supreme Court ruled that the refund statute was applicable to a claim for recovery of unconstitutional taxes. Because the plaintiff in *Wright* had an adequate remedy at law under the refund statute, that Court held he was not entitled to equitable relief in the form of mandamus.

Similarly, in *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), the Court affirmed the dismissal of a mandamus seeking sales tax refunds because the refund statute provided an adequate remedy for the plaintiff's claim that refusal to refund the tax was unconstitutional. This same rationale was applied in *Blackmon v. Georgia Independent Oilmen's Assoc.*, 129 Ga. App. 171, 198 S.E.2d 896, 898 (1973) and *Blackmon v. Premium Oil Stations*, 129 Ga. App. 169, 198 S.E.2d 900, 901 (1973). In both of these cases, taxpayer claims for refunds of illegal taxes were dismissed because the taxpayers did not follow the refund statute procedure.

Finally, in *State v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988), the Georgia Supreme Court applied the limitation period in the refund statute to bar claims for unconstitutional taxes that were more than three years old. This Court held that, "The trial court erred in holding the statute of limitations to O.C.G.A. § 48-2-35 is tolled such that plaintiffs may revive unasserted claims for refunds which might have existed prior to the filing of the complaint." 258 Ga. at 530, 371 S.E.2d at 381.

The effect of this ruling was that the statute of limitations under the refund statute continued to run for all taxpayers whose claims had not been asserted.<sup>12</sup>

Further, as discussed above, *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), addressed the specific tax at issue here. The plaintiff sought an injunction and equitable relief in the form of an escrow fund for the accumulation of taxes paid after *Davis*. Although the plaintiff was initially successful, the Georgia Supreme Court dismissed the action as moot in view of the legislature's repeal of the offending statute. The escrow fund for taxes collected after *Davis* was not a moot issue because it was not addressed by the legislation.

The refund statute was fundamental to the ultimate decision in that case. The central issue pending before this Court was the propriety of an injunction requiring the Commissioner to "maintain an escrow fund for all payments of income taxes attributable to federal pensions" pending a ruling on the constitutionality of the tax. *Id.* at 582, 385 S.E.2d at 74. The escrow fund, an equitable remedy, was appropriate if and only if there was no adequate remedy at law available to the taxpayers for recovery of the illegal *Davis* type tax. The Commissioner vigorously and

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<sup>12</sup>In *Beam II*, the Georgia Supreme Court cited *Private Truck* for the proposition that the refund statute provides a "means by which one may seek a refund of taxes paid pursuant to a statute subsequently declared unconstitutional." *Beam II*, slip op. p. 3, n. 3.



successfully argued in that case that the refund statute, O.C.G.A. § 48-2-35, was an adequate remedy at law and that that statute provided a means for taxpayers to recover refunds of the unconstitutional and illegal *Davis* type tax. The court accepted these arguments and held that the refund statute provided an "adequate remedy" obviating the need for equitable relief, 259 Ga. at 583, 385 S.E. at 75, n.1.

In this case, the trial court found that Col. Reich's claims under O.C.G.A. § 48-2-35 for refunds of taxes for the years 1980 through 1984 were barred by the three-year limitations period set out in the statute. If the refund statute applies to claims for unconstitutional taxes for 1980 through 1984, it must also apply to claims for 1985 through 1988.

Undeniably, Georgia case law establishes that the refund statute applies to Petitioner's claims here. The overwhelming weight of Georgia authority mandates this result.

The Georgia Supreme Court, however, has continued its remedial shell game in *Reich II* and *Beam II*. In *Reich I*, that court held in the second division that the refund statute did not apply to unconstitutional taxes. In *Reich II*, the Court notes that this Court vacated *Reich I*, and the Georgia court "expressly" incorporated Division One of *Reich I*. Slip op. p. 3 (Appendix A, p. 3). But the court is silent about Division Two of *Reich I*.

The problem for that court is that if the refund statute applies to retirees, predeprivation remedies do not matter; retirees are entitled to refunds. But, if the refund statute

does not apply to unconstitutional taxes, the state loses its defense based on standing in the *Beam* case. The standing defense is peculiar to the refund statute, so the statute must apply for the defense to apply.

The court's "solution" to this problem was to apply the statute in *Beam II* but not in *Reich II*. On the same day the court issued two decisions regarding the remedy for unconstitutional taxation. In one case, the court assumed the refund statute applies; in the other case, it did not. If the concept of law has any meaning, it cannot be both. The court offered no explanation for this contradiction.

Unless this Court addresses these circumstances, an injustice will be allowed to stand, and other courts will be encouraged to follow the lead of the Georgia Supreme Court. As this Court held in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682, 50 S. Ct. 451, 454 (1930), "[a] state may not deprive a person of all existing remedies for the enforcement of a right" unless there is "afforded to him some real opportunity to protect it."

## CONCLUSION

Over a four year period, the courts of Georgia have told Petitioner the following:

- (1) Declaratory and equitable relief are not available to federal retirees with *Davis* claims, and the refund

statute provides an adequate remedy at law. *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989).

- (2) You cannot get declaratory or equitable relief because you must follow the procedure of the refund statute. *Salter v. Georgia* (1990) (Appendix F).
- (3) Because the refund statute applies to your case, the limitations period in that statute bars claims before 1985. *Reich v. Collins I* (1991) (Appendix E).
- (4) Declaratory and equitable relief really were available to you four years ago, and you cannot complain now because you did not appeal. *Reich v. Collins II* (1993) (Appendix A).
- (5) The refund statute applies to liquor distillers with claims for unconstitutional tax. *James B. Beam Distilling Co. v. Georgia II*, Ga. S.Ct. Nos. S93A1217, S93A1218 (December 2, 1993) slip op. p. 3, n. 3.
- (6) Even though the refund statute applies to you to bar claims before 1985, and even though it applies to liquor distillers with similar claims, it does not apply to you for claims after 1985. You are not entitled to an explanation of these contradictions. *Reich v. Collins II* (1993) (Appendix A).

There is nothing "due" about this "process." Petitioner has been deprived of rights protected by federal statute and the U.S. Constitution, and he has received no remedy. For the reasons set forth above, Petitioner requests this Petition for Writ of Certiorari be granted.

Respectfully submitted,

Carlton M. Henson  
Counsel of Record

McALPIN, HENSON & KEARNS  
Eleven Piedmont Center  
Suite 400  
3495 Piedmont Road, N.E.  
Atlanta, Georgia 30305  
(404) 239-0774

## APPENDIX A

### IN THE SUPREME COURT OF GEORGIA

Decided: December 2, 1993

S92A0621. *Reich v. Collins, et. al.*

S92A0622. *Reich v. Collins, et. al.*

CLARKE, Chief Justice.

In *Reich v. Collins*, 262 Ga. 625 (422 SE2d 846) (1992) (*Reich v. Collins I*), we were faced with the issue of whether appellant Reich was entitled to a refund of state income taxes paid on his federal military retirement benefits in view of the decision of the United States Supreme Court in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The latter case held that a state taxing scheme which exempts state retirement benefits from the state income taxation but does not so exempt federal retirement benefits violates the United States Constitution.<sup>1</sup> The initial issue to be determined in *Reich v. Collins I* was whether *Davis v. Michigan* should be applied retrospectively to Reich's claim. We held that, under recent decisions of the United States Supreme Court, retrospective application was

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<sup>1</sup>Former OCGA 48-7-27 created a state income taxing scheme, a portion of which was unconstitutional under the authority of *Davis v. Michigan*. After the U.S. Supreme Court decided *Davis*, the Georgia legislature repealed the unconstitutional provisions of the code section.



required, but ultimately concluded that state law barred Reich's claim to a refund under OCGA 48-2-35(a).

The U.S. Supreme Court subsequently granted Reich's petition for certiorari. That Court vacated the judgment in *Reich v. Collins I*, and remanded the case to us "for further consideration in light of *Harper v. Virginia Department of Taxation*," 509 U.S. \_\_\_\_ (113 SC 2510, 509 LE2d \_\_\_\_ ) (1993).

In *Harper*, the United States Supreme Court reversed decision of the Virginia Supreme Court which held that the appellants in that case were not entitled to refunds of state income taxes because *Davis v. Michigan* should be applied prospectively only. The U.S. Supreme Court initially determined that *Davis v. Michigan* applies retrospectively. It then remanded *Harper* to the Virginia Supreme Court to follow the Constitutional mandate of providing relief "consistent with federal due process principles." *Harper*, 113 SC at 2519.

Due process requires that a state provide procedural safeguards against the unlawful exactions of taxes, *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (110 SC 2238, 2250, 100 LE2d 148) (1990), but the state retains some flexibility in the type safeguards it must provide. *Harper*, supra, 113 SC at 2519; *James B. Beam Distilling Co. v. The State of Georgia*, S93A1217, (Decided December \_\_\_, 1993). In remanding *Harper*, the United States Supreme Court held that

If Virginia 'offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause.' [citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 38, n. 21] . . . On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' 113 SC at 2519.<sup>2</sup>

In the first division of *Reich v. Collins I*, we held, consistent with *Harper v. Virginia*, that *Davis v. Michigan* must be applied retrospectively. Because the U.S. Supreme Court has vacated our judgment in that case, we expressly incorporate Division One of *Reich v. Collins I* into this opinion. We therefore conclude that our duty on remand is

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<sup>2</sup>In *McKesson*, the Court suggested that "meaningful, backward-looking relief" could include a refund, *Id.* at 2251, or the assessment and collection of back taxes from those who received favored treatment in violation of the Constitution, *Id.* at 2252.



to determine whether Georgia law provided a predeprivation remedy to Reich sufficient to satisfy the requirements of federal due process as set out in *Harper* and *McKesson*, supra. While the selection of a remedy to be afforded is an issue of state law, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. \_\_\_\_ (111 SC 2439, 115 LE2d 481, 488) (1991), this remedy must satisfy "minimum federal requirements." *Harper*, supra, 113 SC at 2520.

We have recently held in *James B. Beam Distilling Co. v. The State of Georgia*, S93A1217, supra, that the declaratory judgment remedies under OCGA 9-4-1 et seq., as well as statutory injunctive relief remedies available provide meaningful opportunities to taxpayers to litigate the validity of taxes alleged owing prior to the time when the taxes fall due.<sup>3</sup> As such, these remedies are of themselves sufficient to satisfy federal due process requirements.<sup>4</sup>

Additionally, there are predeprivation remedies under the Georgia Administrative Procedure Act of which a taxpayer may avail himself when making a constitutional

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<sup>3</sup>In *McKesson*, supra, 110 SC at 2250, the Court held that "[t]he State may choose to provide a form of predeprivation process," for example by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment . . . ."

<sup>4</sup>Reich maintains that these are not viable remedies because his lawsuit seeking a declaratory judgment that the tax at issue in this case was unconstitutional was dismissed by the superior court. However, Reich did not appeal that decision.

challenge to a state tax. Under OCGA 50-13-12, a taxpayer who is aggrieved by "any act" of the Department of Revenue "in a matter involving . . . liability for taxes," is entitled to a hearing before the Department. OCGA 50-13-19 and OCGA 5-13-20 provide for judicial review to a taxpayer dissatisfied with a decision by the Department of Revenue in a case brought under OCGA 50-13-12.

Further pursuant to OCGA 48-2-59, a taxpayer may appeal an assessment by the Department of Revenue directly to the superior court, without the necessity of an administrative hearing.

We conclude that there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge the requirements of federal due process as set forth in *McKesson* and *Harper*, supra. Consequently, Reich's due process rights have not been violated by the Department's failure to refund to him that portion of income taxes paid in violation of *Davis v. Michigan*.

Judgment affirmed in part and reversed in part. All the Justices concur except Sears-Collins and Carley, JJ., who dissent.

CARLEY, Justice, dissenting.

Former OCGA § 48-7-27 provided that state retirement benefits were exempt from income taxation by the State by that federal retirement benefits were not. However, the unconstitutionality of this former provision was established by the holding in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The mandate of *Davis* is to be applied retroactively, rather than prospectively. *Harper v. Va. Dept. of Taxation*, 509 U.S. \_\_\_\_ (113 SC 2510, 125 LE2d 74 (1993)). Appellant is a Georgia taxpayer who seeks a refund of income taxes that he previously paid to the State pursuant to the unconstitutional provisions of former OCGA § 48-7-27. There is no question of appellant's standing to seek such a refund. Compare *James B. Beam Distilling Co. v. State of Ga.*, \_\_\_\_ Ga. \_\_\_\_ (Case Number S93A1217, decided December 2, 1993). However, the majority nevertheless holds that appellant is not entitled to seek a refund because federal due process has otherwise been satisfied. In my opinion, appellant is entitled to the refund that he seeks and I must, therefore, dissent.

Where, as here, a taxpayer seeks a refund of state taxes that he has paid pursuant to a statute which is in contravention of the federal constitution, "[s]tate law may provide relief beyond the demand of federal due process, [cit.], but under no circumstances may it confine [the

taxpayer] to a lesser remedy, [cit.]." *Harper v. Va. Dept. of Taxation*, supra at \_\_\_\_ (III). The minimum parameters of federal due process are clear. If a State has offered "'a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause.' [Cit.] On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' [Cit.] In providing such relief, a State may either award full refunds to those burdened by the unlawful tax or issue some other order that 'create(s) in hindsight a nondiscriminatory scheme.' [Cit.]" *Harper v. Va. Dept. of Taxation*, supra at \_\_\_\_ (III). In responding to the unconstitutionality of former OCGA § 48-7-27, Georgia did not create "in hindsight a nondiscriminatory scheme" by assessing and collecting back income taxes from those taxpayers whose state retirement benefits had previously been exempted from taxation. See *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 40 (III) (B) (110 SC 2238, 100 LE2d 148) (1990). Georgia merely repealed the unconstitutional provisions of that former statute. Accordingly, appellant is constitutionally entitled to a refund unless he had available to him at the time that he paid the taxes a meaningful opportunity to withhold their payment and to challenge their validity in a

predeprivation hearing. "[I]f a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed 'voluntary.' . . . '(W)here voluntary payment (of a tax) is knowingly made pursuant to an illegal demand, recovery of that payment may be denied.'" *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B), fn. 21. The issue for resolution is, therefore, whether appellant paid the unconstitutional taxes "voluntarily" or under "duress."

In my opinion, nothing under the specific provisions of the state tax code can be said to have provided appellant with the opportunity for a constitutionally meaningful predeprivation challenge to his payment of taxes pursuant to the unconstitutional provisions of former OCGA § 48-7-27. The majority cites OCGA § 48-2-59 as affording appellant such an opportunity. Subsection (a) of that statute does provide generally for an "appeal from any order, ruling, or finding of the commissioner to the superior court . . . ." However,, subsection (c) further provides that, in order to secure review by the superior court, the taxpayer must file a surety bond or other security "conditioned to pay any tax over and above that for which the taxpayer has admitted liability and which is found to be due by a final judgment of the court, together with interest and costs." By conditioning the taxpayer's right to appeal upon the posting of "a surety bond or other security," OCGA § 48-2-59 does not, in my

opinion, satisfy "'the root requirement" of the Due Process Clause . . . "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest," [cit.] . . ." (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 37 (III) (B). To the contrary, that statute is merely one of the "various sanctions and summary remedies [contained in the tax code which are] designed so that [taxpayers] tender tax payments before their obligations are entertained and resolved." (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B).

Thus, I cannot agree with the majority that OCGA § 48-2-59 satisfies minimum federal due process requirements such that appellant's failure to have resorted thereto renders his payment of the unconstitutional state income taxes "voluntary" and nonrefundable. "A State that 'establish(es) various sanctions and summary remedies designed' to prompt taxpayers to 'tender . . . payments before their objections are entertained or resolved' does not provide taxpayers 'a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity.' [Cit.] Such limitations impose constitutionally significant "'duress'" because a tax payment rendered under these circumstances must be treated as an effort 'to avoid financial sanctions or a seizure of real or personal property.' [Cit.] The State accordingly may not confine a taxpayer under duress to prospective relief."



(Emphasis in original.) *Harper v. Va. Dept. of Taxation*, supra at \_\_\_\_ (III), fn. 10.

The majority also finds that the Administrative Procedure Act (APA) afforded appellant a constitutionally meaningful predeprivation remedy for contesting his payment of the unconstitutional taxes. Subsection (a) of OCGA 50-13-12 does provide that the "Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes . . . ." However, appellant was not "aggrieved by any act of the department," but by an allegedly unconstitutional act of the legislature. Even assuming that the department would have had initial jurisdiction under the APA to entertain a challenge to the constitutionality of former OCGA § 48-7-27, such a challenge would be "futile at the time of its making." *Flint River Mills v. Henry*, 234 Ga. 385, 386 (216 SE2d 895) (1975). Thus, to secure a ruling on the constitutionality of former OCGA § 48-7-27 pursuant to the APA, appellant would presumably have been required to undergo an entirely "futile" hearing before the department and then incur the additional expenditure of time and money pursuing an appeal to the superior court. The availability of such an attenuated process cannot, in my opinion, be deemed to have provided appellant "with all of the [predeprivation] process [he] is due: an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any . . . [pre]deprivation of

property." *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 40 (III) (B).

Moreover, nothing in OCGA § 50-13-12 authorizes the taxpayer to withhold his taxes pending resolution of his purported administrative remedy and compels the department to forego the various sanctions and summary remedies that it is otherwise authorized to employ against the taxpayer under the tax code. Subsection (c) of that statute merely provides that, pending the hearing and decision, the department "may suspend or postpone the effective date of its previous action." (Emphasis supplied.) Thus, "[a] taxpayer who chooses [the administrative] remedy . . . is subject to the discretion of the commissioner and/or reviewing court as to whether collection procedures will be stayed ([cit.])." *Gainesville-Hall County Economic Opportunity Org., Inc. v. Blackmon*, 233 Ga. 507, 508 (I) (212 SE2d 341) (1975). Since the administrative remedy relied upon by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies designed to encourage timely payment prior to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process. "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure. [Cits.]" *McKesson v. Div. of*



*Alcoholic Beverages and Tobacco*, supra at 38 (III) (B), fn. 21.

The majority also relies upon the Declaratory Judgment Act as affording appellant a constitutionally meaningful predeprivation remedy. However, there is considerable doubt whether any general remedial statute, such as a declaratory judgment act, can ever be considered to be an available "clear and certain remedy" such that a taxpayer's failure to have invoked those provisions can be deemed to evidence his "voluntary" payment of the controlling decisions of the Supreme Court of the United States, the determination of the availability of a taxpayer's "clear and certain" predeprivation remedy should be confined to a consideration of the specific tax structure enacted by the State, and not be based upon the existence of general remedies which, with the benefit of hindsight, can be urged to have otherwise been available to the taxpayer. See *Harper v. Va. Dept. of Taxation*, supra, and *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra, neither of which discuss the availability of general, rather than specific, taxpayer relief. Confining our inquiry to the specific statutes, such as OCGA §§ 48-2-59 and 50-13-12, which do relate to the resolution of tax disputes, it is clear to me that Georgia has established "various sanctions and summary remedies designed so that [taxpayers] tender tax payments before their objections are entertained and resolved. As a result, [Georgia] does not purport to provide taxpayers like [appellant] with a meaningful opportunity to withhold

payments and to obtain a predeprivation determination of the tax assessment's validity . . ." (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B).

In any event, I cannot agree with the majority's conclusion that the Georgia Declaratory Judgment Act can be considered to be such a "clear and certain remedy" that appellant's failure to have invoked its provisions evidences his "voluntary" payment of the unconstitutional taxes. As is true in the case of the administrative remedy, there is nothing in our Declaratory Judgment Act which authorizes the taxpayer to withhold his taxes pending resolution of his claim or which compels the department to forego employment of the various sanctions and summary remedies that it is otherwise authorized to pursue under the tax code. The trial court is authorized to grant the taxpayer injunctive relief, but the exercise of that authority is discretionary and a taxpayer cannot, therefore, be assured that the department's collection procedures will be stayed. Since the declaratory judgment remedy advanced by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies which are otherwise designed to encourage timely payment of taxes prior to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process.

For all reasons stated, I believe that appellant's payment of the unconstitutional taxes was not made

"voluntarily," but was made under "duress." I believe, therefore, that the majority opinion erroneously "confine[s] [appellant] to a lesser remedy" than that which federal due process demands. *Harper v. Va. Dept. of Taxation*, supra at \_\_\_\_ (III). Accordingly, I must respectfully dissent to the majority's failure to afford appellant the "meaningful backward-looking relief" of the refund to which he is constitutionally entitled. *Harper v. Va. Dept. of Taxation*, supra at \_\_\_\_ (III).

I am authorized to state that Justice Sears-Collins joins in this dissent.

## APPENDIX B

### IN THE SUPREME COURT OF THE UNITED STATES

June 28, 1993

CHARLES J. REICH,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. 92-1276
	)	
MARCUS E. COLLINS,	)	
ET. AL.,	)	
	)	
Respondent.	)	

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of *Harper v. Virginia Department of Taxation*, 509 U.S. \_\_\_\_ (1993).

ss/\_\_\_\_\_  
William K. Suter, Clerk

APPENDIX C

IN THE SUPREME COURT OF GEORGIA

December 17, 1992

The Honorable Supreme Court met pursuant to adjournment.  
The following Order was passed:

CHARLES J. REICH V. MARCUS E. COLLINS, SR.,  
COMR., ET. AL.

Upon consideration of the Motions for Reconsideration filed in these cases, it is ordered that they be hereby denied. All the Justices concur, except Bell, P.J., disqualified, and Hunstein, J., not participating.

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

Decided: November 19, 1992

S92A0621: REICH V. COLLINS, ET. AL.

S92A0622: REICH V. COLLINS, ET. AL.

CLARKE, Chief Justice

We granted the appellant's application to appeal, OCGA § 5-6-35(a), to consider the issue of his entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989).

Former OCGA § 48-7-27 created an income tax exemption for retirement benefits paid by the State of Georgia to retired state employees. No such exemption existed for retirement benefits paid by the federal government to retired federal employees residing in Georgia. In *Davis v. Michigan*, supra, the United States Supreme Court held



that Michigan's taxing scheme, which exempted from state income taxation all state retirement benefits, but taxed all federal retirement benefits, violated the constitutional principles of intergovernmental tax immunity, as well as 4 U.S.C. § 111.<sup>1</sup> Because the state of Michigan conceded that a refund would be due the taxpayer if the Court found its taxing scheme to be unconstitutional, it was not necessary for the Court to determine the merits of the taxpayer's claim for a refund. The case was remanded to the Michigan courts to comply with the Court's "mandate of equal treatment," *Davis*, 489 U.S. at 818, in determining whether the taxpayer was entitled to prospective relief from discriminatory taxation.

Following the decision in *Davis v. Michigan*, the Georgia legislature, in special session, repealed that portion of OCGA § 48-7-27 which granted retired state employees an exemption from income taxation on their retirement benefits. Shortly thereafter, appellant, a retired colonel in the United States Army, filed a claim with the appellee Department of Revenue for a refund of income taxes he had paid to the State of Georgia on his military retirement benefits. The Department denied his claim, and appellant brought this action pursuant to OCGA § 48-2-35.

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<sup>1</sup>This code section permits the States to tax "pay or compensation for personal services as [a federal] officer or employee. . . if the taxation does not discriminate against the employee because of the source of the pay or compensation."

The case came before the trial court on cross-motions for summary judgment. The trial court concluded that former OCGA § 47-7-27 violated the principles of *Davis v. Michigan*, supra, and partially granted the appellant's motion for summary judgment on this issue. However, after analyzing the case under *Chevron Oil v. Huson*, 404 US 97 (92 SC 349, 30 LE2d 296) (1971), the trial court held that *Davis v. Michigan* should not be applied retrospectively. The trial court therefore concluded that the appellant was not entitled to a refund, and granted the appellee's motion for summary judgment in this regard.

The appellant concedes that if this court determines that he is entitled to a refund, he will be eligible only for the taxable years 1985 through 1988.

1. We agree with the trial court that the principles of *Davis v. Michigan* apply to this case.<sup>2</sup> However, we have determined that, with regard to the issue of retroactive application, the case must be analyzed under *James B. Beam v. Georgia*, 501 U.S. \_\_\_\_ (111 SC 2439, 115 LE2d 481) (1991), rather than the test set out in *Chevron Oil*, supra.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (104 SC 3049, 82 LE2d 200 (1984)), the U.S. Supreme Court held that Hawaii's taxing scheme, which distinguished between imported and locally distilled alcohol products, violated the Commerce Clause. Following this decision, *James B. Beam*

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<sup>2</sup>We note that the State did not appeal this ruling by the trial court.



Distilling Company filed a suit for refund of taxes it had paid to the State of Georgia, claiming entitlement to the refund under *Bacchus*. In *James B. Beam v. State of Georgia*, 259 Ga. 363 (382 SE2d 95) (1989), this court recognized that Georgia's taxing scheme, which imposed a higher tax on alcoholic beverages imported into the state than on alcohol produced in this state, violated the principles of *Bacchus*, *supra*. However, analyzing the case under *Chevron Oil*, *supra*, we held that the trial court did not err in applying the *Bacchus* decision prospectively only. The U.S. Supreme Court granted certiorari to our decision in *Beam* and reversed, holding that *Bacchus* should have been applied retroactively to our decision in *Beam*.

The U.S. Supreme Court held that where, in a civil case such as *Bacchus*, it does not reserve the question of whether the holding should be applied retroactively, the decision "is properly understood to have followed the normal rule of retroactive application in a civil case," 115 LE2d. at 490, and thus the decision is to be applied not only to the parties before it, but "to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitation." *Id.* at 488. The Court held that it is error for a lower court to refuse to apply a rule of federal law retroactively after the case announcing it has already done so. *Id.* at 491. The Court went on to distinguish between the issue of retroactivity where a federal law or constitutional question is raised, and the issue of remedies, "i.e., whether the party

prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.* at 487. In the normal circumstance, the issue of retrospectivity, or choice of law, is a federal question, while the remedial inquiry is left to the states. *Id.* at 488. The Court stated, as a general guideline, that when it remands a case to a lower court for consideration of any remedial issues, this "necessarily implies" that the choice of law, or retroactivity, question has been decided, and that the Court will apply its decision not only to the parties before it, but retrospectively to all others not procedurally barred. *Id.* at 490-491.<sup>3</sup>

The State's argument in the case before us is that because it cannot be determined from the Court's opinion in *Davis v. Michigan* that the case was remanded for consideration of remedial issues since Michigan had conceded that a refund was due the taxpayer, it cannot be concluded that the Supreme Court intended retroactive application of the *Davis* decision. We do not agree.

As we read *Davis v. Michigan*, the Court applied its decision to the taxpayer before it. The State of Michigan conceded that if the Court found its taxing scheme to be unconstitutional, then, under state law, the taxpayer would be entitled to a refund. Once the Supreme Court determined

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<sup>3</sup>The Court held in *Beam* that principles of "equality and stare decisis" prevail over the *Chevron Oil* analysis, *Beam*, 115 LE2d at 491, and that the need to ensure that the substantive law "will not shift and spring," *Id.* at 493, limits the "possible applications of *Chevron Oil*." *Id.*

that Michigan's taxing scheme was unconstitutional and applied that principle to the taxpayer, Michigan conceded that the taxpayer was entitled to a refund. It does not follow that if the Supreme Court had determined that its decision in *Davis* was to be prospective only,<sup>4</sup> and thus not applicable to the litigants before it, that the state of Michigan would have conceded the taxpayer was due a refund.

Further, the issue of whether *Davis v. Michigan* is to be applied retroactively is foreclosed by the Supreme Court's decision in *Barker v. Kansas*, \_\_\_ U.S. \_\_\_ (112 SC 1619, \_\_\_ LE2d \_\_\_) (1992). In that case military retirees challenged the Kansas income taxation scheme which permitted taxation of federal retirement benefits while exempting from taxation state retirement benefits. The U.S. Supreme Court held that this case was controlled by *Davis v. Michigan*. The Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid. As such, it is clear that the Court applied the decision of *Michigan v. Davis* retroactively to the litigants in *Barker*,

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<sup>4</sup>See *Beam*, 115 LE2d at 488 for a discussion of prospective application of court decisions. Under the Court's analysis, the prospective method of overruling cases does not apply the new rule to the parties in the case, but only uses the case as a vehicle for announcing a new rule of law. The principle of selective prospectivity, in which the new rule is applied to the litigants before the court, has been abandoned in the criminal context, see *Griffith v. Kentucky*, 479 U.S. 314 (107 SC 708, 93 LE2d 649) (1987), and "appears never to have been endorsed [by the Court] in the civil context." *Beam*, 115 LE2d at 490.

just as the Court applied the *Bacchus* decision retroactively to the litigants in *James Beam*.<sup>5</sup>

We thus conclude that the trial court correctly held that OCGA § 47-7-27 violated the principles of *Davis v. Michigan*, but erred in holding that this case does not apply retroactively.

2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam*, supra, 115 LE2d at 488. As the Supreme Court stated in *Beam*, nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided. . ." *Beam*, 115 LE2d at 494.

OCGA § 48-2-35(a) provides, in part, that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily . . ." (Emphasis supplied.)

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<sup>5</sup>We further note that the Virginia Supreme Court analyzed an identical tax issue under the principles of *Chevron Oil*, and determined that *Davis v. Michigan* is not to be applied retroactively. *Harper v. Virginia Dept. of Taxation*, 401 SE2d 868 (Va. 1991). The U.S. Supreme Court granted certiorari as to this decision, vacated the judgment of the Virginia Supreme Court, and remanded for consideration in light of its decision in *James Beam*. 59 USLW 3863 (July 2, 1991). On remand the Virginia Supreme Court concluded that *James Beam* does not require retroactive application of *Davis v. Michigan*. 410 SE2d 629 (1991). On May 18, 1992, the U.S. Supreme Court granted certiorari to that decision. 60 USLW 3779.

We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assessed and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. See, e.g., *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295(1) (149 SE2d 691) (1966); *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga. App. 169 (198 SE2d 900) (1973). Were we to interpret the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.

Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35(a).

We that this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

Judgment affirmed in part and reversed in part. Hunt, Benham, and Fletcher, JJ., concur; Sears-Collins, J., concurs in judgment only; Bell, P.J., disqualified.

## APPENDIX E

### IN THE SUPERIOR COURT OF CLAYTON COUNTY STATE OF GEORGIA

CHARLES J. REICH,	)	
	)	
<i>Plaintiff,</i>	)	CIVIL ACTION FILE
	)	NO.: 90-cv-18388-4
v.	)	
	)	FILED: Dec. 11, 1991
MARCUS E. COLLINS, SR.,	)	
Individually and in his	)	
capacity as Georgia State	)	
Revenue Commissioner, and the	)	
GEORGIA DEPT. OF REVENUE,	)	
	)	
<i>Defendants.</i>	)	
	)	

## ORDER

### FACTS:

This action was filed April 19, 1990, as a complaint for refund of income taxes paid on military retirement income during the years 1980 through 1988. Under a



previous Georgia law, Section 48-7-27, O.C.G.A., repealed in 1989, retirement income from state government was exempted from income taxation while retirement income from the federal government was not. In *Davis v. Michigan Department of the Treasury*, 489 U.S. 803 (1989), the United States Supreme Court struck down a similar Michigan law both on constitutional grounds and because it violated 4 U.S.C. Section 111. The Plaintiff contends that taxes collected on his military retirement benefits during the years of 1980 through 1988 must be refunded to him in light of this decision. Defendants Marcus E. Collins and the Georgia Department of Revenue have filed a Motion for Summary Judgment on several grounds. The Plaintiff has also moved this Court to grant his Motion for Summary Judgment. These Motions for Summary Judgment were argued on October 18, 1991.

#### ISSUES PRESENTED:

- I. Whether under Georgia law the statute of limitations will permit the Plaintiff's claim?
- II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?
- III. Whether *Davis* should be applied retroactively?

## DISCUSSION:

I. Whether under Georgia law the statute of limitations will limit the Plaintiff's claim?

Section 48-2-35(b)(1), O.C.G.A., provides that a claim for the refund of a tax illegally assessed and collected may be made anytime within three (3) years after the date of the payment to the commissioner. Because the statute is a waiver by the State of its sovereign immunity, it must be strictly enforced. *Ingalls Iron Works Company v. Blackmon*, 133 Ga. App. 164 (1974). This statute of limitations applies even where the refund is based in part on federal law. *McKesson v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990); *Michael v. Louisiana*, 350 U.S. 91 (1955). In the case de jure the Plaintiff contends that the three-year statute of limitation codified in O.C.G.A., 48-2-35, should not apply to those taxes collected under an unconstitutional statute, citing the Georgia Supreme Court's reasoning in *James B. Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E. 2d 95 (1989). The Georgia Supreme Court in *Beam* merely defines the authority which was conferred upon the courts to determine retroactivity of its decision under O.C.G.A., 48-2-35. *Beam* does not, as the Plaintiff argues, reject the basic tenets of O.C.G.A., 48-2-35, as it applies to taxes assessed under an unconstitutional statute. Therefore, because the Plaintiff's claims were filed in April of 1989, and the statute

of limitations does not apply, the Plaintiff could get no refund for taxes paid in 1980 through 1984.

II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?

The Defendants argue that the repealed Georgia statute must be sustained if it bore a reasonable relation to a legitimate state purpose. *Exxon Corporation v. Eagerton*, 462 U.S. 176 (1983). They point out that the preferential income tax treatment given to state retirees is designed to enable the State to hire better employees.

Federal law, however, expressly prohibits state taxation plans which discriminate against federal employees based solely on the source of the pay or compensation. 4 U.S.C., Section 111 (1939). The court in the *Davis* case found that Michigan's discriminatory tax scheme, which was almost identical to Georgia's, violated this statute. In *Davis*, Michigan was not able to demonstrate "significant differences" between federal civil service retirement income and the state retirement income exempted from taxation.

The Defendants before this Court contend that there are significant differences between military retirement pay and state retirement pay because military retirees are still subject to being ordered back into service. Thus, their pay is, at least in part, pay for present services. *McCarty v. McCarty*, 453 U.S. 210, 221-222 (1981).



This argument does not account for the fact that the Georgia statute at issue taxed all federal civil service retirement pay, not specifically military benefits. Thus, it is difficult to accept the Defendants' claim that by taxing military retirement while exempting state retirement, the State was merely taxing a reduced current pay for reduced services. Therefore, because the sole distinction between the two groups of taxpayers is the source of income, one state and one federal, the statute which treated these taxpayers differently violated the principles of *Davis*.

### III. Whether *Davis* should be applied retroactively?

In *Davis v. Michigan Department of The Treasury*, 489 U.S. 803 (1989), the Michigan Department of The Treasury conceded that should its tax scheme be found illegal, the plaintiff, Davis, would be entitled to a refund. For this reason, the U.S. Supreme Court did not reach the issue of whether its decision should be applied retroactively. This silence leaves the issue of retroactivity to be resolved by the valid three-pronged test of *Chevron Oil v. Hudson*, 404 U.S. 97, 106-107 (1971). For a decision to be applied non-retroactively, it must first establish a new principle of law. Second, courts must look to the purpose of this rule to determine whether retroactive application will further or retard its operation. Third, courts must weigh the inequities or hardships imposed by retroactive application.

Three other state supreme courts, in North Carolina, South Carolina and Virginia, have already applied this *Chevron Oil* test to the *Davis* decision and decided that *Davis* applies prospectively only. *Ball v. State*, 395 S.E.2d 171 (S.C. 1990); *Harper v. Virginia Department of Taxation*, 241 Va. 232, 401 S.E.2d 868 (1991); *Swanson v. State of North Carolina*, No. 64PA91 (N.C. S.Ct., filed Aug. 14, 1991).

The *Davis* decision does not seem to be one that should be applied retroactively under the *Chevron Oil* test. According to Defendants' Brief in Support of Motion for Summary Judgment, at page 16, twenty-two (22) states other than Georgia had tax statutes similar to Michigan's. Thus, *Davis* did announce a new rule of law which was not clearly foreshadowed by prior decisions. Moreover, retroactive application would not further the principles of intergovernmental tax immunity, which is to attract qualified individuals to federal employment. Instead, retroactivity would act to punish the State for its past treatment of federal retirees. Finally, the equities are in favor of prospective application only, as retroactive application could create a hardship for the Defendants.

#### ORDER OF COURT

Wherefore, for the reasons discussed above, Defendants' Motion for Summary Judgment is hereby granted on the basis that *Davis v. Michigan* does not apply retroactively. It is also granted in part since the statute of

limitations has run on claims for refunds of taxes paid in the years 1980 through 1984.

Likewise, the Plaintiff's Motion for Summary Judgment is granted in part in that the Georgia statute in question was violative of the principle set forth in *Davis*. Other than as previously stated, the Plaintiff's and the Defendants' Motions for Summary Judgment are hereby denied.

SO ORDERED this 10th day of December, 1991.

/s/ \_\_\_\_\_  
Kenneth Kilpatrick  
Judge, Superior Court  
Clayton Judicial Circuit

## APPENDIX F

### IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

AVERY T. SALTER, JR., CHARLES	)
J. REICH, and ROBERT L. NEAL,	)
	)
Plaintiffs,	)
	) CIVIL
v.	) ACTION FILE
	) NO. D-71448
THE STATE OF GEORGIA,	)
GOVERNOR JOE FRANK	)
HARRIS, AND STATE REVENUE	)
COMMISSIONER MARCUS E.	)
COLLINS, SR.,	)
	)
Defendants.	)
	)

### ORDER

Upon full consideration of the entire record, Respondents' Motion to Dismiss or for Judgment on the Pleadings is hereby GRANTED.

Because of the Doctrine of Sovereign Immunity, the State may not be sued without its consent. Any consent to

be sued which is extended by the State may not be expanded in scope and therefore must be strictly construed. *Ingalls Iron Works Company v. Blackmon*, 133 Ga. App. 164 (1974), citing *Schaffer v. Oxford*, 102 Ga. App. 710 (1960). Section 48-2-35(b)(4) of the Official Code of Georgia Annotated expressly waives sovereign immunity and allows for actions for tax refunds be brought against the State. However, a condition precedent to the State's consent to be sued pursuant to O.C.G.A § 48-2-35 is the filing of a claim for refund by the taxpayer. *Blackmon v. Georgia Independent Oilman's Association et al.*, 129 Ga. App. 171, 173 (1973), citing *Henderson v. Carter*, 229 Ga. 876 (1972).

Plaintiffs have failed to satisfy the condition precedent to waiver of sovereign immunity under O.C.G.A § 48-2-35. Neither Plaintiffs' Petition for Declaratory Judgment and Injunctive relief nor any of the amendments thereto allege facts asserting that Plaintiffs have filed a claim for a refund as required by O.C.G.A § 48-2-35(b)(4). Accordingly, Plaintiffs cannot, as a matter of law, have standing to sue and Defendants' Motion to Dismiss should be and is hereby GRANTED. See *Id.*

This 27th day of MARCH, 1990.

/s/ \_\_\_\_\_  
Joel J. Fryer  
Judge, Fulton Superior Court, A.J.C.



## APPENDIX G

### O.C.G.A. § 48-2-35

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b) (1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his counsel's service in the armed forces during such period, the period of limitation shall date from his or his counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of his action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident and maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date the claim is denied. The two-year period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this

subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

O.C.G.A. § 48-2-59

(a) Except with respect to claims for refunds, either party may appeal from any order, ruling, or finding of the commissioner to the superior court of the county of the residence of the taxpayer, except that:

(1) If the taxpayer is a public utility or nonresident, the appeal of either party shall be to the superior court of the county in which is located the taxpayer's principle place of doing business or in which the taxpayer's chief or highest corporate officer residing in this state maintains his office; or

(2) If the taxpayer is a nonresident individual or a foreign corporation having no place of doing business and no officer or employee residing and maintaining his office in this state, the taxpayer shall have the right to appeal to the Superior Court of Fulton

County or to the superior court of the county in which the commissioner in office at the time the action is filed resides.

(b) The appeal and necessary records shall be certified by the commissioner and shall be filed with the clerk of the superior court within 30 days from the date of decision by the commissioner. The procedure provided by law for applying for and granting appeals from the probate court to the superior court shall apply as far as suitable to the appeal authorized by this Code section, except that the appeal authorized by this Code section may be filed within 30 days from the date of decision by the commissioner.

(c) Before the superior court shall have jurisdiction to entertain an appeal filed by any aggrieved taxpayer, the taxpayer shall file with the clerk of the superior court a written statement whereby the taxpayer agrees to pay on the date or dates the taxes become due all taxes for which the taxpayer has admitted liability. Additionally, the taxpayer shall file with the clerk of the superior court within 30 days from the date of decision by the commissioner, except where the value of the appellant's title or interest in real property owned in this state is in excess of the amount of the tax in dispute, a surety bond or other security in an amount satisfactory to the clerk, conditioned to pay any tax over and above that for which the taxpayer has admitted liability and which is found to be due by a final judgment of

the court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as provided by law.

(d) (1) If the final judgment of the court places upon the taxpayer any tax liability which has not already been paid and if the tax or any part of the tax has:

(A) Not become due on the date of the final judgment of the court, then the taxpayer shall pay the amount of the unpaid tax liability on the due date or dates as provided by law; or

(B) Already become due at the time of final judgment of the court, the taxpayer shall immediately pay the tax or as much of the tax as has already become due, with interest.

(2) In the event the final judgment of the court is adverse to the taxpayer, he shall pay the court costs regardless of whether the tax or any part of the tax has or has not become due at the time of the final judgment of the court.



O.C.G.A. § 50-13-12

(a) The Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes, or any failure of the department to act in such a matter if the failure is deemed an act under any provision of a tax statute administered by the department, or by any order of the department in such a matter other than an order on a hearing of which the taxpayer was given actual notice of at which the taxpayer appeared as a party.

(b) Any such demand for a hearing shall be made within 30 days after the act or failure to act causing the injury and shall specify in what respect the taxpayer is aggrieved and the grounds to be relied upon as a basis for the relief to be demanded at the hearing; and, unless postponed by mutual consent, the hearing shall be held within 30 days after receipt by the Department of Revenue of the demand therefor. The proceeding shall have the status of a contested case.

(c) Pending the hearing and the decision thereof the Department of Revenue may suspend or postpone the effective date of its previous action.

(d) This Code section is not intended to require that the aggrieved taxpayer must demand a hearing hereunder

before pursuing judicial remedies which may be available to him, but an aggrieved taxpayer who does demand a hearing under this Code section shall be deemed to have elected the remedies provided in this Code section and in Code Section 50-13-19 as his exclusive remedies.

O.C.G.A. § 50-13-19

(a) Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This Code section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition within 30 days after the service of the final decision of the agency or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of

the county where the petitioner maintains its principal place of doing business in this state. All proceedings for review, however, with respect to orders, rules, regulations, or other decisions or directives of the Public Service Commission must be brought in the Superior Court of Fulton County. Copies of the petition shall state the nature of the petitioner's interest, the fact showing that the petitioner is aggrieved by the decision, and the ground as specified in subsection (h) of this Code section upon which the petitioner contends that the decision should be reversed or modified. The petition may be amended by leave of court.

(c) Irrespective of any provisions of statute or agency rule with respect to motions for rehearing or reconsideration after a final agency decision or order, the filing of such a motion shall not be a prerequisite to the filing of any action for judicial review or relief; provided, however, that no objection to any order or decision of any agency shall be considered by the court upon petition for review unless such objection has been urged before the agency.

(d) The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided in this subsection, the agency may grant, or the reviewing court may order, a stay upon appropriate terms for good cause shown. In contested cases involving a license to practice medicine or a license to practice dentistry in this

state, a reviewing court may order a stay or an agency may grant a stay only if the court or agency makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

(e) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(f) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(h) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

O.C.G.A. § 50-13-20

An aggrieved party may obtain a review of any final judgment of the superior court under this chapter by the Court of Appeals or the Supreme Court, as provided by law.



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No. 93-908

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In The  
**Supreme Court of the United States**  
October Term, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and THE GEORGIA  
DEPARTMENT OF REVENUE,

*Respondents.*

Petition For Writ Of Certiorari  
To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

WARREN R. CALVERT  
Senior Assistant Attorney General  
(Counsel of Record for Respondents)

MICHAEL J. BOWERS  
Attorney General

DANIEL M. FORMBY  
Senior Assistant Attorney General

*Attorneys for Respondents*

Georgia Department of Law  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334  
(404) 656-3370

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## QUESTIONS PRESENTED

1. Whether Due Process requires the State of Georgia to refund income taxes which petitioner voluntarily paid on his federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), when there were predeprivation remedies by which petitioner could have contested his Georgia income tax liability prior to payment.
2. Whether the Supreme Court of Georgia, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a law later held invalid, deprived the petitioner of an alleged statutory right to such a refund, in violation of Due Process.

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In The  
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October Term, 1993

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CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and THE GEORGIA  
DEPARTMENT OF REVENUE,

*Respondents.*

---

**Petition For Writ Of Certiorari  
To The Supreme Court Of Georgia**

---

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

---

Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. Despite the assertions by the Petitioner and amici, there is no "conflict" among the state supreme courts which warrants certiorari. Moreover, both questions presented by the petition concern issues to which this Court has already spoken, and which the Court has resolved against the position of the Petitioner here. Accordingly, Respondents request that the petition be denied.

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### CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court, which has not yet been officially or unofficially reported, is set forth in *Reich v. Collins*, Nos. S92A0621 and S92A0622 (Ga. Dec. 2, 1993) (LEXIS, States library, Ga. file). The text of the opinion is also included as Appendix A to the Petition for Writ of Certiorari.

---

### STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, see O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. See O.C.G.A. § 48-7-27(a)(5) (Supp. 1993).

Shortly after *Davis* was announced, Petitioner Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Department of Revenue for Georgia income taxes which he had voluntarily paid on his

military retirement benefits for the years 1985 through 1988. When the Department denied his claims, the taxpayer brought suit under O.C.G.A. § 48-2-35, contending that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to the U.S. Constitution, and comparable provisions of the Georgia Constitution. Both the Respondents and the taxpayer subsequently filed motions for summary judgment.

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. Petition for Writ of Certiorari ("Petition"), App. E. However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Col. Reich's application for discretionary appeal. See O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) (hereinafter "*Reich I*"). However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35 did not apply to taxes paid under a law later held unconstitutional, and that Colonel Reich was therefore not entitled under that statute to the refunds he sought. After his motion for

reconsideration was denied, the taxpayer filed a petition for certiorari with this Court, contending, *inter alia*, that Due Process entitled him to refunds if Georgia's refund statute did not.

On June 18, 1993, this Court issued its decision in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). In *Harper* the Court held, based on the reasoning of its earlier decision in *Beam*, that *Davis* applied retroactively to tax years before 1989. *Id.* at 2516-18. The Court noted at the same time, however, that "federal law does not necessarily entitle [federal retirees] to a refund" of amounts paid on their benefits for years before 1989 under income tax statutes invalidated by *Davis*. *Id.* at 2519. "Rather, the Constitution requires [a state simply] 'to provide relief consistent with federal due process principles.'" *Id.* at 2519 (quoting *American Trucking Assns v. Smith*, 496 U.S. 167, 181 (1990) (plurality opinion)). The Court reversed the Virginia court's earlier holding that *Davis* applied prospectively only, but remanded for resolution of the distinct state law remedial issues which remained. *Id.* at 2520. Two weeks later, this Court vacated the decision in *Reich I*, and remanded for reconsideration in light of *Harper*. 61 U.S.L.W. 3867 (U.S. June 28, 1993).

On December 2, 1993, the Georgia Supreme Court held on remand that Due Process did not entitle the taxpayer to a refund of the taxes he voluntarily paid on his federal retirement benefits prior to the decision in *Davis*, since Georgia law provided predeprivation remedies by which he could have contested his taxes prior to payment. *Reich v. Collins*, Nos. S92A0621 and S92A0622 (Ga. Dec. 2, 1993) (LEXIS, States library, Ga.

file) (hereinafter "*Reich II*"). The taxpayer filed the instant petition for certiorari on December 8, 1993.

#### Response to the Taxpayer's Statement of the Case

The "Statement" on pages 4 through 7 of the taxpayer's petition contains certain assertions that are unsupported in the record, misleading, or irrelevant to this case. The taxpayer states that "[f]ollowing *Davis*, state officials in Georgia advised retirees to file refund claims under O.C.G.A. § 48-2-35 by filing amended returns." Petition, p. 4. No effort was made in the trial court to establish a record concerning any such "advice". Except for a newspaper article which coincidentally refers to statements purportedly made by a Revenue Department official, which was attached for other reasons as an exhibit to a deposition taken by the taxpayer, there is nothing whatsoever in the record even arguably supporting this assertion. Moreover, Col. Reich seems to be suggesting that statements made after *Davis* misled him into foregoing a pre-payment challenge to his taxes, even though the amounts which he seeks to recover were paid prior to this Court's decision in *Davis*.

On page 6 of his petition, the taxpayer refers to the proceedings in *Avery T. Salter, et al. v. The State of Georgia, et al.*, Fulton Superior Court, Civil Action No. D-71448, litigation in which he was involved before the present action commenced. Col. Reich has also included as Appendix F to his petition a copy of the trial court's order dismissing that action. The taxpayer made no record in the trial court concerning the earlier litigation, and although he attempted to fill that gap at the Georgia



Supreme Court level simply by attaching copies of selected portions of the *Salter* file to his appellate brief, nothing which transpired in the *Salter* litigation is properly a matter of record here. The proceedings in *Salter* are also irrelevant to the issues presented here, for the reasons stated on page 15 *infra*.

Finally, the description of the Georgia Supreme Court's decision in *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989) on page 5 of the petition is incomplete and inaccurate. See pages 14-15 *infra*.

---

### SUMMARY OF ARGUMENT

The petition in this case advances two legal arguments. The first is that Due Process requires the State of Georgia to refund income taxes which Col. Reich voluntarily paid on his federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), even though there were predeprivation remedies under state law by which he could have contested such taxes prior to payment. The taxpayer and amici submit that certiorari should be granted because of an alleged "conflict" between the holding of the Georgia Supreme Court and decisions by other state courts of last resort. The supposed "conflict" is contrived. Both *Harper* and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) recognize that a particular state's pre- and post-payment remedial scheme can affect the Due Process inquiry, and the holdings elsewhere can be explained on the basis of such differences. In fact, the taxpayer's Due Process argument in this case was settled

by the Court's decision in *McKesson*, holding that "[t]he availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause." 496 U.S. at 38 n.21.

The taxpayer's second argument – that the Supreme Court of Georgia, by virtue of its construction of Georgia's income tax refund provisions, violated Due Process by depriving the taxpayer of an alleged statutory right to the refunds he seeks – is based on the taxpayer's belief that a state court decision on a question of state law violates the Fourteenth Amendment if the decision reverses prior cases or is somehow "wrong". While the Respondents do not agree with the taxpayer's characterization of the Georgia Supreme Court's interpretation of Georgia's refund statute, the general proposition on which this Due Process argument rests has nevertheless been explicitly rejected by this Court in the past.

---

### ARGUMENT

#### I. BECAUSE THERE WERE PREDEPRIVATION REMEDIES BY WHICH PETITIONER COULD HAVE CONTESTED HIS TAX LIABILITY PRIOR TO PAYMENT, DUE PROCESS DOES NOT REQUIRE THE STATE OF GEORGIA TO REFUND INCOME TAXES WHICH PETITIONER VOLUNTARILY PAID ON HIS FEDERAL RETIREMENT BENEFITS.

Col. Reich asserts that "this Court will invite inconsistent and confusing results unless it provides definitive



guidance in this case." Petition, p. 8. Amici argue that certiorari should be granted because the Georgia Supreme Court's holding is in direct conflict with *Davis* decisions rendered after *Harper* by other state courts of last resort, see *Hagge v. Iowa Dep't of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993); *Strelecki v. Oklahoma Tax Comm'n*, No. 77,615 (Okla. Sept. 28, 1993) (LEXIS, States library, Okla. file); *Brumley v. Utah State Tax Comm'n*, No. 910242 (Utah Sept. 2, 1993) (LEXIS, States library, Utah file), and with the holding in *Standard Oil, Inc. v. North Dakota*, 479 N.W.2d 815 (N.D. 1992). For the reasons discussed below, the supposed "conflict" with other state decisions is contrived. In fact, this Court provided definitive guidance in *Harper* and in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), where it held that "[t]he availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause." 496 U.S. at 38 n.21.

#### Decisions In Other States

This Court recognized in *Harper* that the outcomes in cases like this could differ, depending on the particular state's pre- and post-payment remedial scheme. See *Harper*, 113 S. Ct. at 2520 ("[t]he constitutional sufficiency of any remedy . . . turns (at least initially) on whether [state] law 'provide[s] a[n] [adequate] form of predeprivation process' ") (quoting *McKesson*, 496 U.S. at 36-37). Although Col. Reich and amici clearly would prefer otherwise, a proper application of the same Due Process principles may result in federal retirees receiving refunds in some states but not in others. This is not the type of "conflict" justifying a grant of certiorari in this case.

In *Hagge*, for example, Iowa taxing officials asserted that federal retirees could have brought an action to enjoin the unconstitutional collection of income taxes on their pensions, and that this procedure was an adequate predeprivation remedy. The Iowa Supreme Court observed that:

The department cites only one case . . . in support of its claim that equitable relief would have been available to Hagge and other taxpayers. . . . We are persuaded that the department's consent to the procedure [in the case cited] was motivated more by desire to promptly resolve a well-orchestrated statutory challenge than by belief that equitable relief is ordinarily available to tax protestors.

. . . [W]e note that the position taken here by the department is essentially contrary to that advanced in [other litigation], where we held that the *absence* of predeprivation hearings in the taxing context is amply justified by the practicalities of tax collection. . . .

Within the more customary channels for protesting tax assessments, the department cites neither statute nor administrative rule that would permit taxpayers to 'withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.'

504 N.W.2d at 451 (emphasis in original). By contrast, the Utah Supreme Court's opinion in *Brumley* does not reflect that predeprivation remedies were even asserted as a defense.

The only arguable conflict in *Davis* cases since *Harper* arises from the decision by the Oklahoma Supreme Court in *Strelecki*. The Oklahoma court's Due Process discussion is so clearly wrong, however, that it cannot create a "conflict" sufficient to warrant certiorari here. The Oklahoma Supreme Court stated that taxpayers who paid amounts under a statute which had not yet been declared unconstitutional must – as a matter of Due Process – be afforded an adequate opportunity to obtain a refund of such amounts once the statute is invalidated, and that the availability of predeprivation remedies under which such a taxpayer could have secured the ruling of unconstitutionality himself makes no difference. *Strelecki*, slip op. at 19. Even Col. Reich and amici do not make this argument, for it is completely at odds with this Court's holdings in *McKesson* and *Harper*. Moreover, in view of what the Oklahoma Supreme Court determined to have been a binding, pre-*Harper* concession regarding the availability of refunds under state law, *Strelecki*'s Due Process discussion is dictum. See *Strelecki*, slip op. at 15 ("the Commission is bound . . . by [its] pre-*Harper* position" that refunds would be due if *Davis* applied retroactively).

The last decision which amici maintain "conflicts" with the holding of the Georgia Supreme Court is *Standard Oil, Inc. v. North Dakota*, 479 N.W.2d 815 (N.D. 1992). The North Dakota Supreme Court found that a company subject to motor fuel taxes in North Dakota did not have "a meaningful opportunity to withhold payment and obtain a predeprivation determination of the [tax's] validity" because the company would lose its license to do business in that state if it refused to pay. 479 N.W.2d at

822-23. Col. Reich faced nothing comparable if he had pursued a pre-payment remedy in Georgia to contest his income taxes. Again, *Harper* and *McKesson* recognize that a particular state's statutory scheme can affect the Due Process inquiry, and all the decisions supposedly creating a "conflict" with the holding below are easily explained on that basis.

### *McKesson, Harper, and The Decision In This Case*

Col. Reich's argument that Due Process requires the State of Georgia to refund income taxes which he voluntarily paid on federal retirement benefits before the decision in *Davis*, even though predeprivation remedies were available under state law by which he could have contested such taxes prior to payment, is foreclosed by the decision in *McKesson*. Respondents submit that *McKesson* addresses only a state's Due Process obligation to return taxes collected under a statute which the state, from the date of enactment, knew or should have known was unconstitutional. As the *McKesson* Court observed, "[t]he [challenged] Liquor Tax reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). . . . The State can hardly claim surprise at the Florida courts' invalidation of the scheme." *Id.* at 46. See Hellerstein, *Preliminary Reflections On McKesson and American Trucking Associations*, 48 Tax Notes 325 (*McKesson* held that "a taxpayer who is compelled to pay a tax that is later held to be unconstitutional under established Commerce Clause principles is entitled to meaningful retrospective



relief.") By contrast, the unconstitutionality of Georgia's tax treatment of federal retirees was not clear prior to *Davis*. See *Harper*, 113 S. Ct. at 2538 ("The circumstances in *McKesson* were quite different than those here. In *McKesson*, the tax imposed was patently unconstitutional.") (O'Connor, J., dissenting).

Even under a broader reading of *McKesson*, however, the Due Process rights of Col. Reich were not violated by the State of Georgia. As stated in *McKesson*,

in order to satisfy the commands of the Due Process Clause[, the] State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

*McKesson*, 496 U.S. at 36-37 (footnotes omitted). "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *Id.* at 38 n.21 (emphasis added). These principles were reaffirmed in *Harper*, 113 S. Ct. at 2519.

In *McKesson*, the Court observed that Florida had established procedures designed so that taxpayers "tender tax payments before their objections are entertained and resolved". *McKesson*, 496 U.S. at 38 (emphasis in original).

As a result, Florida does not purport to provide taxpayers like petitioner with a meaningful

opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida requires the taxpayers to raise their objections to the tax in a post-deprivation refund action.

*Id.* at 38 (footnote omitted). "[I]n *McKesson*, the fact that Florida had provided no predeprivation relief was dispositive. Only because the state had provided no 'procedural safeguards against unlawful exactions' was it required to render meaningful backward looking relief." Note, *Non-retroactivity in Constitutional Tax Refund Cases*, 43 Hastings L. J. 421, 469-70 (1992). Accord *The Supreme Court-Leading Cases*, 104 Harv. L. Rev. 129, 190 (1990) (*McKesson* concerns situations where "a state provides a taxpayer with only a post-payment remedy"). In contrast to the situation in *McKesson*, the Georgia Supreme Court correctly reaffirmed that there were several methods whereby Col. Reich could have contested his Georgia income tax liabilities for 1985 through 1988 prior to payment.

### Georgia's predeprivation remedies

A taxpayer may, within 30 days of the issuance of a deficiency assessment against him, request a hearing under Georgia's Administrative Procedures Act ("APA"). O.C.G.A. § 50-13-12. If he receives an adverse administrative decision, the aggrieved taxpayer may seek superior and appellate court review. O.C.G.A. §§ 50-13-19, -20. After receiving a notice of assessment, a taxpayer may choose to forego an administrative hearing, appealing directly to the superior court for judicial review. O.C.G.A. § 48-2-59. See *Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341



(1975); *Waldron v. Collins*, 788 F.2d 736, 738 (1986). Declaratory and injunctive relief are also available to challenge unconstitutional statutes and taxes. See *Parrish v. Employees' Retirement System of Georgia*, 260 Ga. 613, 398 S.E.2d 353 (1990) (suit for declaratory and injunctive relief challenging constitutionality of amendments to income tax statute); *State v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988) (suit for declaratory and injunctive relief challenging validity of highway user taxes); *Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (suit for injunctive relief to challenge constitutionality of alcohol tax statute). *Reich II*, slip op. at 3-4 (App. A, pp. 4A-5A.) In addition, if the taxpayer has chosen not to pursue any other predeprivation remedy, and faces a Revenue Department writ of execution for the disputed taxes, an "affidavit of illegality" is available to stop any actual collection efforts. O.C.G.A. § 48-3-1. In providing such predeprivation remedies, the State of Georgia has done all that Due Process requires, even if Georgia's tax treatment of federal retirees could have been considered "patently unconstitutional" before *Davis*.

According to Col. Reich, that portion of the Georgia Supreme Court's decision regarding declaratory and injunctive relief "defies logic". Petition, p. 10. The taxpayer asserts that "the Georgia Supreme Court denied [such] relief to federal retirees . . . four years ago [in *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989)]." *Waldron* was filed immediately after *Davis* was decided. By the time of the Georgia Supreme Court's decision, however, the legislature had amended Georgia's statutes to eliminate any disparity between state and federal retirees, and the constitutionality of Georgia's law was no

longer in doubt. Because the record did not indicate that any of the actual parties involved had not already paid their taxes for years still affected by *Davis*, the plaintiffs – who did not include the taxpayer here – were unable to show a need at that time for declaratory or injunctive relief. *Id.* at 582 n.1, 385 S.E.2d at 74 n.1.<sup>1</sup>

Col. Reich next argues that "a taxpayer seeking to void a tax statute as unconstitutional could not obtain that relief under the Administrative Procedure Act." Petition, p. 11. Where the constitutional validity of a statute is challenged before an administrative hearing officer or board in Georgia, the officer or board is without power to declare the statute unconstitutional. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975). However, the constitutional issues may be raised before the administrative hearing officer in a tax appeal brought under O.C.G.A. § 50-13-12, and will be resolved by the superior court on review of the agency decision. See *Georgia Real Estate Commission v. Burnett*, 243 Ga. 516, 255 S.E.2d 38 (1978). See generally *State Board of Equalization v. Trailer Train Co.*, 253 Ga. 449, 320 S.E.2d 758 (1984) (involving ad valorem tax appeals brought under O.C.G.A. § 48-2-18).

<sup>1</sup> Col. Reich complains that he was denied declaratory and injunctive relief in *Salter, et al. v. The State of Georgia, et al.*, Fulton Superior Court, Civil Action No. D-71448. Nothing which occurred in the *Salter* case is properly a matter of record in this litigation. See pp. 5-6 *supra*. Nevertheless, *Salter* was filed after *Davis*, seeking to declare Georgia's income tax scheme invalid, and the litigation did not ask for refunds of taxes which had already been paid. The complaint in *Salter* was dismissed by the trial court after the General Assembly's amendments to Georgia's income tax statutes mooted the claim concerning the constitutionality of such statutes.

### Bonding requirements

The taxpayer does not appear to dispute that he could have excluded his federal retirement benefits from income reported on his Georgia return and appealed the resulting deficiency assessment under O.C.G.A. § 48-2-59. Instead, he argues that this predeprivation remedy does not satisfy Due Process because it requires that the taxpayer provide adequate security in case he loses. See O.C.G.A. § 48-2-59(c). Petition, p. 12. Georgia's "affidavit of illegality" procedure also requires "a good and solvent bond in such an amount to cover the total of any adverse judgment". O.C.G.A. § 48-3-1.

Col. Reich's argument was rejected by the Court over one hundred years ago. In *McMillen v. Anderson*, 95 U.S. 37 (1877), the taxpayer argued that a statute which permitted the collection of disputed taxes to be enjoined was insufficient for Due Process purposes because the statute required that a bond be posted for double the amount at issue. "[I]t is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue." *Id.* at 42. This assertion gave the Court but little pause:

It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its

process from being used to work gross injustice to another.

*Id.* See generally *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue").

In *Ownbey v. Morgan*, 256 U.S. 94 (1921), this Court rejected the argument that Due Process was violated by a state statute which required the defendant in a foreign attachment case to provide security before the defendant could appear and contest the merits of the plaintiff's demand.

It is said the essential element of due process – the right to appear and be heard in defense of the action – is lacking. But the statute in plain terms gives to defendant the opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process.

*Id.* at 102-103. The Court held that the bond requirement did not deny the defendant's Due Process rights, observing that "[t]he due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall." See generally *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 553 (1949) ("A state may [generally] set the terms on which it will permit litigations in its courts[,



without thereby offending Due Process]. . . . [I]t is [normally] within the power of a state to close its courts to . . . litigation if the condition of reasonable security is not met.")

### Georgia's failure-to-pay penalty

Col. Reich maintains that Georgia's predeprivation remedies do not satisfy Due Process because if he had used such a remedy and lost, he might have had to pay a 25% failure-to-pay penalty. See O.C.G.A. § 48-7-86(a)(1)(B). Of course, if a taxpayer contests his liability prior to payment and prevails, no such amounts would be due. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Anderson v. Manzo*, 380 U.S. 545, 552 (1965)). In any event, this penalty – which equals one-half of 1 percent per month, up to a maximum of 25% – may not be imposed "when . . . the failure is due to reasonable cause and not due to willful neglect." O.C.G.A. § 48-7-86(a)(2).

There is no conceivable Due Process problem with the sufficiency of a pre-payment remedy which does not preclude the imposition of a penalty, not exceeding 25%, when a taxpayer does not have a good faith, reasonable basis for his refusal to pay. See generally *Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964) ("It is urged that the penalties of contempt risked by a refusal to comply with [IRS] summonses are so severe that the statutory procedure [for contesting such a summons] amounts to a denial of judicial review. . . . It is sufficient to say that noncompliance is not subject to prosecution thereunder when the summons

is attacked in good faith."); *Wagner Electric Corp. v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985) ("even though a penalty might discourage a party from seeking judicial review, that penalty [can] be enforced against a party [who lacks] an objectively good faith challenge"). "[T]he Constitution [does not] dictate[] risk-free litigation. . . . [T]he Constitution is offended [only] when the penalty system is of such a nature as to create a virtual roadblock to judicial review." *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 484 (D.D.C. 1975) (emphasis added). Col. Reich has no support for his contention that a predeprivation remedy is not "fair and meaningful" unless a losing taxpayer is never subject to penalties, no matter how untenable the taxpayer's reasons for not paying in the first instance.<sup>2</sup>

### The accrual of interest

The taxpayer also asserts that Georgia's predeprivation remedies violate Due Process because a taxpayer has to pay interest if he loses. Petition, p. 13. "[I]nterest [is merely] a means of compensation", *United States v. Childs*, 266 U.S. 304, 307 (1924), designed to insure that a state involved in litigation with a taxpayer who has not paid the disputed liability does not lose the time-value of any

<sup>2</sup> Col. Reich suggests that the Georgia Revenue Department will in fact assess the failure-to-pay penalty against any taxpayer pursuing a predeprivation remedy, because such a penalty was assessed against him for 1988 despite "a bona fide, good faith, and reasonable challenge". Petition, pp. 15-16. In fact, the taxpayer was assessed a penalty for failing to pay the amount reflected on his own return for 1988 as due.



amounts eventually found to be due. It makes no sense to maintain that a predeprivation remedy is not "fair and meaningful" unless a losing taxpayer is never subject to interest. This standard is in no way suggested by a fair reading of *McKesson* or any other case, and Respondents know of no pre-payment remedy anywhere which meets such a test.

### The "risk" of criminal prosecution.

Col. Reich argues that Georgia's predeprivation remedies do not satisfy Due Process because "not paying the contested tax *always* creates the risk that *some* prosecutor will pursue criminal prosecution [and t]he only clear and certain way to avoid this risk is to pay the tax." Petition, p. 15 (emphasis added). In fact, Col. Reich and amici have asserted that the State Revenue Commissioner is obligated to prosecute criminally any taxpayer who has used an accepted method to pursue a reasonable, good faith predeprivation challenge to his tax liability. See generally Petition, pp. 15-16. It is uncontested that Col. Reich was never so much as threatened with prosecution if he elected to pursue a predeprivation procedure for contesting his tax liability.

The taxpayer's contention regarding criminal prosecution is untenable. A taxpayer who has used an accepted method to assert a reasonable, good faith predeprivation challenge to his taxes is not properly subject to criminal prosecution in Georgia. The mere possibility that some state official, acting unreasonably or in bad faith, could conceivably try to prosecute under such circumstances does not make Georgia's predeprivation remedies

inadequate for Due Process purposes. The Commissioner is unaware of any jurisdiction which does not have appropriate criminal sanctions for taxpayers who willfully refuse to pay taxes they lawfully owe. See, e.g., 26 U.S.C. § 7203. Simply put, Col. Reich believes that no predeprivation remedy satisfies Due Process, and that the *McKesson* inquiry is actually meaningless.

In addition, Col. Reich could not in any event have been prosecuted under the criminal statutes cited to this Court. Petition, p. 13. While Code Section 48-7-2 provides that it is a misdemeanor "for any person who is required to pay any tax . . . imposed by [the income tax provisions of the Revenue Code] to fail to . . . [p]ay the tax", this portion of the statute was declared unconstitutional prior to the date on which Col. Reich would have been required to file his return for 1985, the first tax year at issue in this case. See *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985). Code Section 48-16-12(b) provides that "any person who . . . willfully fails to pay taxes owing . . . , with intent to evade payment of the taxes owed . . . shall be guilty of a felony." However, that statute was not enacted until 1992, see 1992 Ga. Laws 1249, and therefore could not have been applied to Col. Reich if he had decided to contest his 1985, 1986, 1987, and 1988 taxes prior to payment. See generally U.S. Const., Art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law").

Code Section 48-7-5, which was enacted by the General Assembly in 1987, provides that "[a]ny person who willfully evades or defeats or willfully attempts to evade or defeat, in any manner, any income tax, penalty, interest, or other amount in excess of \$3,000.00 . . . shall . . . be

guilty of a felony." This statute could not have been applied *ex post facto* to Col. Reich if he had pursued a predeprivation remedy to challenge his 1985 and 1986 taxes. Nor could it have been used against him for later years, since the amounts which he disputes do not total as much as \$3,000.00 in any such subsequent period. In addition, federal cases may be used as aids in interpreting Georgia tax provisions patterned after federal statutes. *Blackmon v. Mazo*, 125 Ga. App. 193, 196, 186 S.E.2d 889, 891 (1971). This Court has indicated that a taxpayer with a sincerely held belief that a statute is unconstitutional has not acted "willfully", within the meaning of the criminal provisions of 26 U.S.C. § 7201, when he refuses to pay the disputed tax and pursues his predeprivation remedy before the U.S. Tax Court – even where his belief concerning the statute's validity is objectively unreasonable. *Cheek v. United States*, 498 U.S. 192, 206 (1991).

#### Collection during a predeprivation tax dispute

There is no authority for the taxpayer's claim that collection action may be taken in Georgia against a person whose tax liability is already in court pursuant to a proper appeal under O.C.G.A. § 48-2-59. The requirement in Code Section 48-2-59(c) that a taxpayer provide "a surety bond or other security . . . to pay any tax . . . which is found to be due by a final judgment of the court" precludes the need for collection of the disputed liability during the litigation. Georgia's APA expressly provides a means for staying enforcement of a tax assessment pending a final ruling in any action brought under O.C.G.A. § 50-13-12. See O.C.G.A. §§ 50-13-12(c), -19. An action for declaratory and injunctive relief necessarily contemplates

a stay of enforcement, as does an "affidavit of illegality" under Code Section 48-3-1.

#### II. THE GEORGIA SUPREME COURT, BY CONSTRUING GEORGIA'S INCOME TAX REFUND STATUTE TO BE INAPPLICABLE TO TAXES PAID UNDER A LAW LATER HELD INVALID, DID NOT DEPRIVE THE PETITIONER OF AN ALLEGED STATUTORY RIGHT TO SUCH A REFUND, IN VIOLATION OF DUE PROCESS

The taxpayer also argues that the Georgia Supreme Court, by virtue of its interpretation of O.C.G.A. § 48-2-35, has deprived him of a statutory right to the refunds he seeks, in violation of Due Process. The taxpayer's contention is based on his assertion that "until *Reich I*, it was settled Georgia law that the refund statute provided relief for illegal and unconstitutional taxes." Petition, p. 21. Even if the taxpayer were correct in so characterizing Georgia law before *Reich I* – which Respondents dispute, see pp. 26-27 *infra* – his constitutional argument is wholly without merit.

An unforeseeable judicial enlargement of a criminal statute, applied retroactively, may violate a defendant's Due Process right "to fair warning of that conduct which will give rise to criminal penalties." *Marks v. United States*, 430 U.S. 188, 191 (1977). But in the civil context, "[n]o one has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central Railroad Company v. White*, 243 U.S. 188, 198 (1917).



Even if it be true . . . that the [state court] departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. . . . [T]he decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed.

*Patterson v. Colorado*, 205 U.S. 454, 461 (1907). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) ("the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law").

The case upon which the taxpayer largely relies, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), is easily distinguished on its facts. The plaintiff in *Brinkerhoff* brought suit in Missouri to enjoin the collection of certain disputed taxes, using the only remedy which, according to settled state law, was available to contest such liabilities. After the trial court dismissed the plaintiff's complaint, an appeal was taken to the Missouri Supreme Court. The Missouri Supreme Court affirmed, holding that a suit in equity was improper because the plaintiff had not first exhausted an administrative remedy before the Missouri State Tax Commission. In so holding, the Court overruled a prior decision that the administrative remedy could not be used in such cases. By this time, however, it was too late for the plaintiff to invoke the alternative procedure.

This Court reversed, stating that "[i]t is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it *at any time* an opportunity to be heard in its defense." 281 U.S. at 678 (emphasis added).

[U]ntil . . . the [Missouri Supreme Court's] opinion in the case at bar was delivered, the Tax Commission could not, because of [the Missouri Supreme Court's earlier decision], grant the relief to which the plaintiff was entitled on the facts alleged. After [the Missouri Supreme Court's opinion], the Commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the Commission could act had long expired. Obviously, therefore, *at no time* did the State provide to the plaintiff an administrative remedy against the alleged illegal tax.

*Id.* at 679 (emphasis added). In the Court's view, "[i]f the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its *ever* having had an opportunity to defend against the exaction." *Id.* at 679. The Court was careful to point out, however, that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." *Id.* at 681 n.8.

Because there were ample other procedures by which Colonel Reich might have contested the Georgia tax on his federal retirement benefits, this case is unlike *Brinkerhoff*, and the taxpayer is no better off than any



litigant who "assume[s] the risk that the ultimate interpretation by the highest court [of any particular procedure] might differ from [his] own." *Brinkerhoff*, 281 U.S. at 682 n.9. The taxpayer's Due Process attack on the Georgia Supreme Court's interpretation of O.C.G.A. § 48-2-35 is wholly without merit.

The cases cited by the taxpayer do not in any event support his claim that "[f]or more than 50 years, Georgia's refund statute . . . has provided an unqualified right to refunds of taxes" paid under these circumstances. Petition, p. 19. In *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the taxpayer - who had pursued a refund claim for amounts collected under an allegedly unconstitutional law - brought a mandamus action under the refund statute to compel approval of his claim. *Id.* at 866, 16 S.E.2d at 874. The Georgia Supreme Court held merely that the refund statute did not provide for mandamus, affirming the trial court's dismissal of the complaint. In later litigation involving identical taxes, the Georgia Supreme Court found that the refund statute did not apply at all, because the disputed amounts were for periods prior to the statute's effective date. *Eibel v. Forrester*, 194 Ga. 439, 441, 22 S.E.2d 96, 98 (1942).

In *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), the Georgia Supreme Court affirmed the dismissal of a mandamus action seeking certain sales tax refunds because, among other reasons, the taxpayer had an adequate legal remedy under the refund statute. *Id.* at 880, 195 S.E.2d at 7. However, the plaintiff in that case did not argue that the tax statute under which the disputed amounts had been paid was itself unconstitutional. Rather, the plaintiff asserted only "that the refusal . . . to

refund such moneys amount[ed] to depriving the complainant . . . of [her] rightful property without due process of law." *Id.* at 877, 195 S.E.2d at 5 (emphasis added).

Col. Reich maintains that in *State v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988) "the Georgia Supreme Court applied the limitation period in the refund statute to bar claims for unconstitutional taxes that were more than three years old." Petition, p. 22. However, in *Private Truck Council*, the Court plainly noted that "[t]his was not a suit brought for a refund under O.C.G.A. § 48-2-35." 258 Ga. at 534, 371 S.E.2d at 380.

Finally, the Georgia Supreme Court's passing reference to the refund statute in *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), set out in footnote 1 of the court's opinion, is dictum which does not have the precedential weight which the taxpayer attributes to it. See pp. 14-15 *supra*. Nor did the Georgia Supreme Court "hold" in *James B. Beam Distilling Co. v. Georgia*, Nos. S93A1217 and S93A1218 (Ga. Dec. 2, 1993) (LEXIS, States library, Ga. file) ("*Beam II*") that O.C.G.A. § 48-2-35 provides a means by which liquor distillers may receive refunds of taxes paid under a law subsequently declared unconstitutional. In *Beam II*, the Georgia Supreme Court ruled only that, assuming *arguendo* that Code Section 48-2-35 applied to Beam's claim, Beam lacked standing to obtain a refund of taxes which Beam had billed to its wholesalers as taxes and recovered from them.

## CONCLUSION

Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are special and important reasons for it. U.S. Sup. Ct. Rule 10; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955). Certiorari should not be granted "except in cases involving principles . . . of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). See generally U.S. Sup. Ct. Rule 10.1 (regarding considerations governing review on writ of certiorari). Any supposed "conflict" between the decision of the Georgia Supreme Court and holdings elsewhere can be explained by the differences in such other state's pre- and post-payment remedial schemes. In addition, the constitutional arguments which Colonel Reich seeks to raise in this case have been settled by this Court's prior opinions and warrant no further review. Respondents therefore respectfully request that the petition be denied.

Respectfully submitted,

WARREN R. CALVERT  
Senior Assistant Attorney General  
(Counsel of Record for Respondents)

MICHAEL J. BOWERS  
Attorney General

DANIEL M. FORMBY  
Senior Assistant Attorney General

*Attorneys for Respondents*

Georgia Department of Law  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334  
(404) 656-3370

(5)

No. 93-908

Supreme Court, U.S.  
FILED  
JAN 12 1994

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

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CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS AND THE GEORGIA  
DEPARTMENT OF REVENUE,  
*Respondents.*

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On Petition for Writ of Certiorari to the  
Supreme Court of Georgia

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**REPLY BRIEF FOR PETITIONER**

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CARLTON M. HENSON  
*Counsel of Record.*  
MCALPIN, HENSON & KEARNS  
Eleven Piedmont Center  
Suite 400  
3495 Piedmont Road, N.E.  
Atlanta, GA 30305  
(404) 239-0774



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Supreme Court of Georgia

REPLY BRIEF FOR PETITIONER

Petitioner urges this Court to grant certiorari. The decision below is a defiant rejection of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), and the decision below conflicts with *Harper v. Virginia Dept. of Taxation*, 509 U.S. — (1993), *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18 (1990) and *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912). There is a conflict among state supreme courts. Finally, there is a substantial federal interest involved that directly affects hundreds of thousands of individual citizens. Virtually every factor relevant to the grant of certiorari is presented by this case.

Petitioner files this reply to briefly address Respondent's Brief in Opposition and to inform the Court of recent developments since the Petition was filed.

## I. THE DURESS OF CRIMINAL PROSECUTION.

The Commissioner disdains the risk of criminal prosecution claiming Georgia's criminal statute is unconstitutional, and that Petitioner could not be prosecuted for a good faith belief that the tax is illegal. These claims cannot withstand even the slightest of scrutiny.

Georgia has a barrage of vigorous and complete criminal sanctions for taxpayers who fail to make payment of taxes when due. Georgia's criminal statutes impose increasingly severe sanctions, depending on whether willfulness is present or not and depending on the amount in issue. Mere nonpayment of a tax when due is punishable as a misdemeanor under O.C.G.A. § 48-7-2. There is no requirement of willfulness under this statute.

In *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985), the Georgia Supreme Court held that "§ 48-7-2 (a)(1) is unconstitutional on state law grounds to the extent that it authorizes imprisonment for mere nonpayment of income taxes." 326 S.E.2d at 730. Contrary to the Respondent's claim, the court did not declare the entire statute unconstitutional. The emphasis on imprisonment left standing the alternative criminal punishment of a criminal fine in the amount of \$1,000 under O.C.G.A. § 17-10-3. Thus, Petitioner and other retirees still face the risk of criminal prosecution, the stigma and record of a conviction, and a fine of \$1,000 for each nonpayment.

Where willfulness is present, a taxpayer may be prosecuted and imprisoned for a misdemeanor under O.C.G.A. § 48-7-127(c). Similar to the federal scheme, Georgia requires married taxpayers with gross incomes over \$3,000 to file and pay quarterly estimates. O.C.G.A. § 48-7-114. Thus, Petitioner's failure to make his final estimate payment due April 17, 1989 puts him at risk under two different statutes.

Finally, although not applicable to Petitioner, if the amount involved is \$3,000 or more, a taxpayer may be prosecuted for a felony.

Respondent suggests that Col. Reich could not have been prosecuted under these statutes based on *Cheek v. United States*, 498 U.S. 192 (1991). From 1985 through 1988, though, Petitioner could not have been aware of *Cheek* because it had not been decided. Even after *Cheek*, there remains a question whether Petitioner could be prosecuted despite his good faith belief that the tax was illegal. See *Niedringhaus v. Commissioner of Internal Revenue*, 99 T.C. No. 11, Tax Ct. Rep. (CCH) 48,411 (1992) ("There is a difference, however, between a good faith misunderstanding of the law and a good faith belief that the law is invalid or a good faith disagreement with the law").

In any event, even if willfulness was not present, Petitioner has been and remains subject to prosecution under § 48-7-2.

There is no remedy, no procedure, no course of action Petitioner or any taxpayer can take to eliminate these criminal statutes. In Georgia, any taxpayer who does not pay an income tax when due runs the risk of criminal prosecution.

## II. IN A SIMILAR CASE, RESPONDENT HAS RECENTLY BEGUN ISSUING REFUNDS UNDER A STATE STATUTE DECLARED ILLEGAL UNDER GEORGIA LAW.

Since the Petition for Certiorari in this case was filed, the Respondent has begun issuing refunds with statutory 9% interest following the December 3, 1993 decision of the Cobb County Superior Court in *Tedder v. Collins*, Cobb Civil Action No. 93-1-5530-28.

In 1992, Respondent amended Revenue Department regulations regarding the sales tax collected on used cars, and beginning in July 1992, the Revenue Department imposed a sales tax on private sales of used cars. In *Tedder*, the trial court ruled that this tax was illegal under Georgia case law. See "Georgia may be refunding



illegal tax." The Atlanta Constitution at B1 (Dec. 4, 1993).

The Commissioner did not appeal this decision. During the public discussion of whether refunds should be given, the Attorney General wrote to the Governor and Respondent:

We strongly recommend against any refunds at this time, unless the State is prepared also to pay refunds in *Reich* and *Beam*, which have a combined \$160 million in potential claims. Payment of refunds in this case could seriously jeopardize our positions in the other pending refund cases.

Letters of December 9, 1993 from Michael J. Bowers to Honorable Zell Miller and Honorable Marcus E. Collins, Sr. See "Bowers opposes refund of vehicle tax fears state would be forced to repay other proceeds," The Atlanta Constitution at p.3 (Dec. 10, 1993). Petitioner could not agree more. The two cases are legally indistinguishable. Georgia law and federal due process mandate similar treatment for federal retirees.

In response to the ruling of the trial court, the Commissioner, acting on the direction of the Governor, began providing refunds to persons who paid taxes under the amended regulation. See 241 Daily Tax Rep. (BNA) at H-2 (Dec. 17, 1993); 5 State Tax Notes (Tax Analysts) at 1531 (Dec. 27, 1993); "Miller says he'll refund \$34 million from tax on used-vehicle sales," The Atlanta Constitution at A1 (Dec. 15, 1993). These refunds are to be paid with statutory interest. "Tax cut to end 'business as usual'," The Albany Herald at 1A (Dec. 18, 1993). The Commissioner has provided a simplified 8" by 5" form for the filing of the refund claims, and the Commissioner has even implemented an information number for taxpayers to call to get information about how to get a refund.

The contrast between this situation and federal retirees is striking. Unlike the retiree cases, the Commissioner did not resist a declaratory suit on the basis that the refund statute provided an adequate remedy at law. Unlike the retiree cases, he did not litigate every issue ad infinitum. Unlike the retiree cases, the Commissioner has provided a specialized refund form and information phone number.

The lesson of these cases is clear. If you live in Georgia and pay a tax that is illegal under the U.S. Constitution, you have no chance of having it refunded. However, if you should be fortunate enough to pay a tax illegal under state tax statutes, a refund with statutory interest at 9% is virtually assured.

### III. OTHER RECENT DEVELOPMENTS.

The Court should also be aware that in *Harper v. Virginia Dept. of Taxation*, Case No. CL891080, the Circuit Court of Alexandria ruled on January 7, 1994 that the availability of declaratory relief under Virginia Code Section 8.01-184 satisfied due process and that no refunds were required notwithstanding the provisions of Virginia's refund statute in § 58.1-1826.

Further, the New York State Department of Taxation and Finance has advised citizens in New York that it is unable to pay properly filed *Davis* related refund claims without further judicial guidance because "the U.S. Supreme Court did not give the states a clear answer on the refund remedy in its recent decision in *Harper v. Virginia Dept. of Taxation* . . . ." *McQueen, Shop Talk: New York, Montana & Oklahoma Deal with the Harper Decision*, 3 Journal of Multistate Taxation 284 (Jan.-Feb. 1994).

These cases and these circumstances demonstrate the pressing need for guidance from this Court.

**CONCLUSION**

For the foregoing reasons, and for the reasons set forth in Petitioner's initial brief, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

CARLTON M. HENSON  
*Counsel of Record*  
MCALPIN, HENSON & KEARNS  
Eleven Piedmont Center  
Suite 400  
3495 Piedmont Road, N.E.  
Atlanta, GA 30305  
(404) 239-0774

January 12, 1994

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
Supreme Court of Georgia

BRIEF *AMICUS CURIAE* ON BEHALF  
OF THE MILITARY COALITION  
IN SUPPORT OF PETITIONER

EUGENE O. DUFFY \*  
GREGORY W. LYONS  
O'NEIL, CANNON & HOLLMAN, S.C.  
111 E. Wisconsin Avenue  
Suite 1400  
Milwaukee, WI 53202  
(414) 276-5000  
*Attorneys for Amicus*

January 6, 1994

\* Counsel of Record



### **QUESTIONS PRESENTED**

1. Whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity?
2. Whether a state may collect taxes from its citizens in violation of the Constitution, provide a right to refunds for the unconstitutional taxation, and then eliminate the right to refunds after the time has passed for any other relief?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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 No. 93-908
 

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CHARLES J. REICH,  
*Petitioner,*  
 v.  
 MARCUS E. COLLINS, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
 Supreme Court of Georgia

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**BRIEF AMICUS CURIAE ON BEHALF  
 OF THE MILITARY COALITION  
 IN SUPPORT OF PETITIONER**

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**INTEREST OF THE AMICUS CURIAE**

Pursuant to Rule 37.2 of this Court, The Military Coalition (herein "TMC") respectfully submits this brief as *amicus curiae*.<sup>1</sup> TMC is a voluntary association of 24 military-related organizations which was formed six years ago. App. A, 1a. Collectively its constituent organizations represent the interests of over 1,900,000 members, who are retired, reserve and active members of the Uniformed Services of the United States. TMC is dedicated to the purpose of providing a cohesive means for the study and advocacy of issues which impact upon the maintenance of a strong national defense and the preser-

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<sup>1</sup> *Amicus* has received the written consents of the parties to the filing of this brief; those consents have been filed with the Clerk of the Court.

vation of rights and benefits its varied constituents have earned through years of dedicated service to the United States.

Despite this Court's unequivocal mandates in *Harper v. Virginia Dep't of Taxation*, 509 U.S. —, 113 S. Ct. 2510 (1993), and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), the State of Georgia and approximately seven other states continue to refuse to give effect to this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), as the controlling statement of federal law. The resolution of the questions presented in this case is vitally important to *amicus*. If the decision below is permitted to stand, military retirees and, indeed, military members on active duty throughout the fifty states will be at risk that rights established by Congress may be arbitrarily abridged by any state solely on the basis of local political considerations. *Amicus* has supported the enactment of several measures by Congress which prohibit discrimination of the type upheld by the decision below. Thus, *amicus* has a unique perspective on the questions presented by this case as well as a vital interest in its proper resolution.

#### REASONS FOR GRANTING THE WRIT

This case raises questions of substantial public importance concerning the propriety of states retaining taxes collected in violation of the Constitution and statutes of the United States. This case represents a variation of the recurring theme of the states denying federal rights by denying citizens a remedy for the states' violation of federal rights. Specifically, this case presents the interrelated questions of whether a state court may change a state's remedial rules after the tax has been collected by creating a remedial scheme that is wholly illusory—one that results in the unlawful exaction remaining in the state treasury, while denying citizens a real opportunity to protect the federal right. Review by this Court is necessary

to resolve finally the issue of whether this Court's decisions in *Harper v. Virginia Dep't of Taxation*, — U.S. —, 113 S. Ct. 2510 (1993), *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Atchison, T. & S.F. R. Co. v. O'Connor*, 223 U.S. 280 (1912), may be subverted through the charade of state procedures which do not satisfy constitutional standards.

1. This is the *second* petition in this case and the twelfth to be filed within the last two terms challenging a state's refusal to refund taxes collected in violation of the intergovernmental tax immunity doctrine.<sup>2</sup> Several of the petitions decided last term involved the question of whether this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), may be applied non-retroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their retired pay. Now, in the wake of this Court's decision in *Harper* and its prior remand of this case, the issues presented by this petition—whether the states may deny relief under the guise of constitutionally deficient state remedies—is at the forefront of the states' continu-

<sup>2</sup> See *Pledger v. Bosnick*, No. 91-375, cert. denied, 113 S. Ct. 3034 (1993); *Barker v. Kansas*, No. 91-611, rev'd, 112 S. Ct. 1619 (1992); *Harper v. Virginia Dep't of Taxation*, No. 91-794, rev'd, 113 S. Ct. 2510 (1993); *Colorado v. Kuhn*, No. 91-980, cert. dismissed, 112 S. Ct. 1925 (1992); *Swanson v. North Carolina*, No. 91-1436, cert. granted and judgment vacated, 113 S. Ct. 3025 (1993); *Sheehy v. Montana Dep't of Revenue*, No. 91-1473, cert. granted and judgment vacated, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, No. 91-1697, cert. granted and judgment vacated, 113 S. Ct. 3025 (1993); *Norwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue*, No. 91-2047, cert. granted and judgment vacated, 113 S. Ct. 3026 (1993); *Duffy v. Wetzler*, No. 92-521, cert. granted and judgment vacated, 113 S. Ct. 3027 (1993); *Reich v. Collins*, No. 92-1276, cert. granted and judgment vacated, 113 S. Ct. 3028 (1993); and *Bohn v. Waddell*, No. 92-1748, cert. denied, 113 S. Ct. 3000 (1993).



ing refusal to recognize this Court's decisions as the "controlling statement of federal law." *Harper*, 113 S. Ct. at 2515. This issue is currently being raised by the states upon remand in the *Davis*-related cases of *Harper, supra*, *Duffy, supra*, *Swanson, supra*, and *Barker, supra*.<sup>3</sup> In addition, identical issues are currently pending before the Minnesota Supreme Court upon remand in *Norwest Bank Duluth, N.A., supra*.<sup>4</sup> Finally, an analogous approach has also been successfully asserted by the respondents in *Beam* upon remand to nullify this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. —, 111 S. Ct. 2439 (1991). See *James B. Beam Distilling Co. v. Georgia*, 1993 WL 503244 (Ga., Dec. 2, 1993).

In contrast to the decision here, three state courts of last resort have rejected efforts to date by the states of Iowa, Utah, and Oklahoma to nullify this Court's decisions in *Davis, supra*, *McKesson, supra*, and *Harper, supra*. See *Hagge v. Iowa Dep't of Revenue and Fin.*, 504 N.W.2d 448 (Iowa 1993); *Brumley v. Utah State Tax Comm'n*, No. 910242, 1993 WL 333583 (Utah, Sept. 2,

<sup>3</sup> The positions of the states are disingenuous. For example, in *Barker* the State conceded during oral argument that a decision by this Court in favor of military retirees would obligate it to refund 91 million dollars to the members of the certified class. (Official Transcript, March 3, 1992, p. 38-39). The State also acknowledged that there was no protest requirement conditioning the right to refunds in Kansas and that this Court's decision in *Barker* would govern all members of the class. *Id.* at 39-40. Yet, on remand, the state of Kansas is now attempting to play the same game that Georgia has played here. See *Barker v. Kansas*, District Court of Shawnee County, Kansas Division Four, No.: 89-CV-666 and 1100 (consolidated), Defendants' Motion to Dismiss Plaintiffs' Claims for Income Tax Refunds, dated Dec. 1, 1992.

<sup>4</sup> Identical issues are pending in the *Davis*-related cases of *Wisconsin Dep't of Revenue v. Hogan*, petition for review pending, 93-CV-2549, Circuit Court for Dane County (settlement pending); *Winstead v. Marx*, Nos. 91-CC-422, 91-CC-474, 91-CC-475, 91-CC-476, Supreme Court of Mississippi; and *Gossum v. Commonwealth of Kentucky Revenue Cabinet*, 92-SC-1041-T, Kentucky Supreme Court.

1993); *Strelecki v. Oklahoma Tax Comm'n*, No. 77,615, 1993 WL 379008 (Okla., Sept. 28, 1993). However, both Utah and Oklahoma have petitions for reconsideration pending.

While analytically different from the retroactivity issue resolved by this Court in *Harper*, this petition presents the same ultimate question of whether states may render the enforcement of federal rights inutile by denying citizens a remedy for the states' violations of federal rights. Until definitively ordered by this Court, state courts will continue to struggle with this issue under its new guise of constitutionally deficient state remedies.<sup>5</sup> See *Tatarowicz, Harper v. Virginia Supports Retroactive Relief From Unconstitutional State Taxes*, 3 Journal of Multistate Taxation 244 (Jan. Feb. 1994). Review by this Court is thus necessary to resolve this question of demonstrated difficulty and importance.

2. The decision of the Georgia Supreme Court conflicts with the holdings of the Court in *Harper v. Virginia Dep't of Taxation*, — U.S. —, 113 S.Ct. 2510

<sup>5</sup> In the wake of *Beam*, the states quickly realized that they could no longer rely on the prospectivity defense to defeat the enforcement of federal rights. See, e.g., *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318, 339-43, cert. denied, 113 S. Ct. 676 (1992) (following *Beam* and abolishing the rule of selective prospectivity originally announced in *National Can Corp. v. Washington Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988)). Indeed, upon the completion of briefing and oral argument before this Court in *Harper*, state taxing authorities conceded that it was unlikely that a prospectivity analysis of *Davis* was warranted. They also acknowledged that it was doubtful that *Davis* satisfied the threshold test for prospectivity. See HARPER ORAL ARGUMENT ADDRESSES TAXPAYER REMEDY, Tax Administrators News, December, 1992 at 137. However, these state authorities were also quick to point out that hope was not lost because there was now a new game: "procedural bars" to remedies. *Id.* at 144. This was so even though such positions were "meritless." See, e.g., *Brumley v. Utah State Tax Comm'n, supra*; *Strelecki v. Oklahoma Tax Comm'n, supra*.



(1993); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); and *Atchinson, T. & S.F. R.-Co. v. O'Connor*, 223 U.S. 280 (1912). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of these landmark decisions of this Court.

This Court's mandate in *Reich I* required the Georgia Supreme Court to re-examine its decision. See *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). However, the Georgia Supreme Court continues to be "a little too slow to recognize the implied duress under which payment is made." *O'Connor*, 223 U.S. at 286.<sup>6</sup> In addition, the Supreme Court of Georgia has been "too slow to recognize" the chameleon-like tactics of the respondents in this case. It has simply adopted what "the home crowd wants" as the decision in this case. See Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 Pepperdine Law Review 227, 230 (1980). In rendering the decision below, the Georgia Supreme Court ignored that the respondents have previously prevailed in establishing that federal retirees, including the petitioner in this case, were not entitled to injunctive relief because the Georgia refund statute, O.C.G.A. § 48-2-35 (Pet. App. G at 1G), provided an adequate remedy at law in this case. See *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989) ("[T]he refund statute (O.C.G.A. § 48-2-35) provides an adequate remedy for any vestigial, disparity").<sup>7</sup>

<sup>6</sup> Indeed, as ably demonstrated in the dissent below, the Georgia Supreme Court's unsupported conclusion that Georgia's law satisfies federal due process cannot withstand scrutiny. Pet. at 6a-14a.

<sup>7</sup> See, e.g., Brief for Petitioners at 16-17 ("Brief of Appellants"), *Collins v. Waldron*, No. 47018, *supra*. In addition, the Court below also ignored that long before *Davis*, Georgia federal retirees were denied access to federal court because, *inter alia*, the respondents had established that an action for refund under O.C.G.A. § 48-2-35 was an adequate remedy. See *Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986).

The Georgia Supreme Court's holding in this case that the availability of a declaratory judgment action satisfies the requirements of due process and excuses the state's obligation to provide retroactive relief is untenable. It is indisputable that Georgia has established a comprehensive scheme of sanctions, summary remedies and criminal penalties which are designed "to prompt" taxpayers to pay their taxes before their objections are entertained. *Harper*, 113 S. Ct. at 2519, 2520 n.10.<sup>8</sup> The holding of the Georgia Supreme Court is directly contrary to the holdings of the Court in both *McKesson* and *O'Connor*.

In *O'Connor*, Colorado asserted that the taxpayer was not entitled to a return of the taxes because "[t]he plaintiff could have enjoined any effort to enforce the collection of the tax." *O'Connor*, 223 U.S. at 284. The Court held that this was inadequate because the taxpayer "could have had no certainty of ultimate success" and was not required "to take the risk" of not prevailing. *Id.* at 286. In *McKesson*, the taxpayer was awarded "declaratory and injunctive relief against continued enforcement of the discriminatory provisions." *McKesson*, 496 U.S. at 31. However, the Court held that this relief alone was inadequate to satisfy "the requirements of federal law." *Id.* Because Florida "penaliz[ed] taxpayers for failure to remit their

<sup>8</sup> The financial sanctions include, e.g., a failure to *prepay* penalty at the rate of 9% per annum, a penalty equal to 25% of the tax and additional interest at the rate of 12% per annum. See O.C.G.A. §§ 48-7-120(a), 48-7-86, 48-2-40, App. B at 14a, 12a, 8a. Georgia also has a variety of summary remedies for the collection of unpaid taxes, including attachment, garnishment and levy. See O.C.G.A. § 48-2-55, App. B at 16a. Georgia also imposes criminal sanctions on a delinquent taxpayer. See O.C.G.A. §§ 48-7-2, 48-7-5, 48-16-12(b), App. B at 9a, 10a, 16a. In addition, tax officials and law enforcement officers in Georgia are *obligated*, by statute, to prosecute any taxpayer who fails to pay his taxes when due. See O.C.G.A. § 48-2-81. See also *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (taxpayer faced with threat of criminal prosecution despite pending objection to the validity of the tax).

taxes in a timely fashion," the due process clause mandated retroactive relief. *Id.* at 51. Therefore, even if the petitioner could have obtained declaratory relief here, that alone would not have satisfied "the requirements of federal law." *Id.* at 31.<sup>9</sup> Because Georgia has established "'various sanctions and summary remedies designed' to prompt taxpayers to 'tender . . . payments before their objections are entertained or resolved'", it must provide retroactive relief. *Harper*, 113 S. Ct. at 2519-20 n.10.<sup>10</sup>

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioner, are relegated exclusively to state courts to press their claims for refunds. But it is state courts that have demonstrated the greatest difficulty in applying the Fourteenth Amendment. This Court is the only federal court that can hear the retirees' claims. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions to all federal retirees and, indeed, all state taxpayers. Absent review by this Court, "[t]he State too easily avoids its responsibilities and . . . go[es] its way unimpeded and unburdened with any remedy for those who have been wronged during the period of [Georgia's] noncompliance with federal law."

<sup>9</sup> However, no such remedy existed. The Attorney General for Georgia should be embarrassed to recall that at his urging, all members of the federal retiree class, including the petitioner, were denied this relief for tax year 1988.

<sup>10</sup> Indeed, the availability of declaratory relief under Georgia's scheme is meaningless because a taxpayer is subject to constitutional duress before such a proceeding could have even been commenced. The Georgia personal income tax law not only imposes sanctions for taxpayers who fail to pay their taxes when due, but the law requires taxpayers to *prepay* their liability in the first instance. See O.C.G.A. §§ 48-7-114, 48-7-115, App. B at 13a-14a. A taxpayer who fails to meet this prepayment requirement is liable for a penalty. See O.C.G.A. § 48-7-120(a), App. B at 14a. Thus, in the first instance, it is impossible for the Georgia scheme as construed by the Georgia Supreme Court to satisfy due process.

*Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).<sup>11</sup>

3. The result reached by the Supreme Court of Georgia also discriminates based on the origin of the petitioner's claims. In Georgia, taxpayers seeking to enforce rights secured under state law are assured a clear and certain judicial remedy to obtain refunds under O.C.G.A. § 48-2-35. Pet. at App. 1G. This clear and certain remedy is available whether the tax sought to be refunded has been paid with or without protest and is available irrespective of whether predeprivation remedies were invoked by the taxpayer. See O.C.G.A. § 48-2-35, Pet. at App. 1G.

The clarity of this right was again recently demonstrated in the wake of the Georgia Supreme Court's decision in this case. On December 14, 1993, Governor Zell Miller announced that the state will refund \$38 million in sales tax imposed upon the private, casual sales of vehicles by individuals. This decision was in response to a Georgia Superior Court ruling which had held that the tax was invalid under Georgia law. See 241 Daily Tax Rep. (BNA) at H-2 (Dec. 17, 1993); 5 State Tax Notes (Tax Analysts) at 1531 (Dec. 27, 1993). These refunds are to be paid with statutory interest. See "*Tax cut to end 'business as usual'*", The Albany Herald at 1A (Dec. 18, 1993).

A state remedial scheme that provides a clear and certain remedy for claims based on state law but denies that right to taxpayers seeking to enforce constitutional rights is unconstitutional. See *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 234 (1934) ("A state may

<sup>11</sup> In stark contrast to the decision below, in those rare circumstances where federal courts have been able to exercise jurisdiction, there has been no difficulty in providing taxpayer relief for unconstitutional state taxes. See, e.g., *United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct. 2888 (1991).



not discriminate against rights arising under federal laws." Cf. *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); *NAACP v. Alabama*, 357 U.S. 449, 457 (1958).

4. In denying the petitioner refund relief for taxes collected in violation of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), the court below refused to give effect to the settled practice of the respondents<sup>12</sup> and the court's own prior decisions regarding the refund statute of O.C.G.A. § 48-2-35. See, e.g., *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989) ("Even so, the refund statute (O.C.G.A. § 48-2-35) provides [federal retirees] an adequate remedy for any vestigial, disparity.") As a result of the decision below, the Supreme Court of Georgia cut off the petitioner's existing remedy under the refund statute. This result conflicts with the decisions of this Court.

In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), the Court held that the state court violated the Due Process Clause by judicially depriving the taxpayer of all available remedies for challenging the validity of a tax. Specifically, the Court held that a tax-

<sup>12</sup> "Settled state practice" evidences state law. As the Court explained in *Nashville, Charlotte & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940):

It would be a narrow conception of jurisprudence to confine the notion of "law" to what is found written on the statute books, and to disregard the gloss which life has written upon it. *Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law.* The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, . . . are often . . . truer law than the dead words of the written text.

(emphasis added). See, e.g., statement of Amelia W. Baker, Esq., Assistant Attorney General of Georgia, to the Court in *Beam*: "There is no requirement for a protest in Georgia. The refund statute does not require a protest." Official Transcript, October 30, 1990, p. 31.

payer has a property interest in a remedy procedure, and this property interest is protected by the Due Process Clause:

Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

*Id.* at 682 (footnote and citations omitted).

The petitioner here is in precisely the same situation as the taxpayer in *Brinkerhoff-Faris*. At the time he elected to pursue the refund remedy under O.C.G.A. § 48-2-35, it was settled law that refunds were available in the situation at issue in this case. *Collins v. Waldron*, 385 S.E.2d at 75 n.1; *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972); *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941). Therefore, he had a property interest in the remedy elected—refunds pursuant to O.C.G.A. § 48-2-35—and the decision of the Georgia Supreme Court extinguishing that right at a time when petitioner had no other remedy available violated the Due Process Clause. *Brinkerhoff-Faris*, 281 U.S. at 682. Thus, this Court should grant the petition and reverse the decision below.

5. Review by this Court is also necessary to resolve the conflict among the state courts of last resort regarding what is sufficient to satisfy the minimum requirements of federal due process. Contrary to the decision below, the Supreme Court of North Dakota has held that refunds were required under *McKesson* despite the availability of a declaratory judgment proceeding in light of the financial sanctions available to the state. See *Service Oil, Inc. v. North Dakota*, 479 N.W.2d 815 (N.D. 1992). Similarly, in the post-*Harper Davis*-related case of *Hagge v. Iowa Dep't of Revenue & Fin.*, 504 N.W.2d 448 (Iowa 1993), the Iowa Department of Revenue advanced an



argument identical to the one asserted here by the respondents. The Supreme Court of Iowa rejected Iowa's argument and awarded full refunds to federal retirees: "we are convinced that, by *McKesson* standards, tax payment in Iowa continues to be less 'voluntary' than 'under duress'" *Id.* at 451 (citation omitted).<sup>13</sup>

Similar to the arguments of the respondents adopted by the court below, the Oklahoma Tax Commission in the *Davis*-related *Strelecki* case asserted that the Oklahoma refund statute need not be applied because there were other possible pre-deprivation remedies the taxpayers could have invoked. The Oklahoma Supreme Court categorically rejected these arguments on both state and federal due process grounds. *See Strelecki v. Oklahoma Tax Comm'n*, No. 77,615, 1993 WL 379008 (Okla., Sept. 28, 1993).

As the result of this conflict, taxpayers throughout the country remain unsure of what they must do to preserve their rights to relief from unconstitutional state taxation. As one prominent tax commentator recently observed:

*Harper* answered only some of the questions taxpayers are asking in their attempts to secure refunds of unconstitutional taxes. A complete understanding of what is required is still several court decisions away, including the issue of appropriate remedies presented by *Harper* itself.

Tatarowicz, *Harper v. Virginia Supports Retroactive Relief From Unconstitutional State Taxes*, 3 Journal of Multistate Taxation 244, 247 (Jan. Feb. 1994). Absent further guidance from this Court that the time for tolera-

<sup>13</sup> The court in *Hagge* specifically held that "[a]lthough the department argues strenuously that Hagge could have long ago brought suit under Iowa Rules of Civil Procedure 261 and 266 to enjoin the unconstitutional collection of state income tax on his federal pension, we seriously question whether such process would qualify as "meaningful" under a *McKesson* analysis." *Id.* at 450 (emphasis added).

tion of the states' chameleon-like tactics has come to an end, no citizen will be able to enforce his or her right to relief from unconstitutional state taxation. Amicus respectfully submits that a complete understanding of what is required can be finally laid to rest by the grant of the petition in this case.

Amicus respectfully urges this Court to grant the petition and reverse the decision below. Absent such review, the states will continue their efforts to annul the judgments of this Court. If these state efforts go unchecked, "the constitution itself [will] become[] a solemn mockery . . . ." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citation omitted).

#### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Georgia should be granted and its decision reversed.

Respectfully submitted,

EUGENE O. DUFFY \*  
GREGORY W. LYONS  
O'NEIL, CANNON & HOLLMAN, S.C.  
111 E. Wisconsin Avenue  
Suite 1400  
Milwaukee, WI 53202  
(414) 276-5000  
*Attorneys for Amicus*

\* Counsel of Record

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## **APPENDICES**

**APPENDIX A****MEMBERS OF THE MILITARY COALITION****THE RETIRED OFFICERS ASSOCIATION (TROA)**

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

**AIR FORCE ASSOCIATION (AFA)**

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

**AIR FORCE SERGEANTS ASSOCIATION (AFSA)**

The Air Force Sergeants Association was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

**ASSOCIATION OF MILITARY SURGEONS  
OF THE UNITED STATES (AMSUS)**

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its



membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

#### **ASSOCIATION OF U.S. ARMY (AUSA)**

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

#### **CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)**

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

#### **COMMISSIONED OFFICERS ASSOCIATION OF THE U.S. PUBLIC HEALTH SERVICE, INC. (COA)**

The Commissioned Officers Association of the U.S. Public Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The

purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

#### **ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE U.S. (EANGUS)**

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

#### **FLEET RESERVE ASSOCIATION (FRA)**

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to represent its members on military personnel legislative matters before Congress.

#### **MARINE CORPS LEAGUE (MCL)**

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

### **MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)**

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

### **NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)**

The National Association for Uniformed Services/Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SWM membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

### **NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)**

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

### **NATIONAL MILITARY FAMILY ASSOCIATION (NMFA)**

The National Military Family Association was founded in 1969 and has approximately 10,000 members. Mem-

bership is open to active duty, retired and reserve component members of the seven uniformed services and their family members. The association's mission is to serve as an advocate for uniformed service families and to educate and inform them concerning issues affecting their lives.

### **NAVAL ENLISTED RESERVE ASSOCIATION (NERA)**

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The Association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

### **NAVAL RESERVE ASSOCIATION (NRA)**

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

### **NAVY LEAGUE OF THE UNITED STATES (NLUS)**

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

### **NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NCOA)**

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organiza-



tion operating under Texas Corporate Charter. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

### **RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES (ROA)**

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,000 members. The purpose of the Association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

### **THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)**

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

### **THE MILITARY CHAPLAINS ASSOCIATION (MCA)**

The Military Chaplains Association was founded in 1925 and chartered by the 81st Congress in 1950. It has approximately 1,300 members. Membership is open to all

chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

### **THE RETIRED ENLISTED ASSOCIATION (TREA)**

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

### **U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)**

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

### **U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)**

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.



## APPENDIX B

EXCERPTS OF RELEVANT PORTIONS OF THE  
GEORGIA STATE STATUTES

**Sec. 48-2-40. Rate of interest on past due taxes.**—Except as otherwise expressly provided by law, taxes owed the state or any local taxing jurisdiction shall bear interest at the rate of 1 percent per month from the date the tax is due until the date the tax is paid. For the purpose of this Code section, any period of less than one month shall be considered to be one month. This Code section shall also apply to alcoholic beverage taxes.

\* \* \* \*

**Sec. 48-2-42. Nature of penalties.**—All penalties imposed by law are part of the tax and are to be collected as such. The proceedings to collect the original tax, the tax constituted from penalties imposed, and the interest shall be conducted in the same manner. Any provision of law for criminal prosecution shall not operate under the tax laws of this state to relieve any taxpayer of any tax, penalty, or interest imposed by law.

\* \* \* \*

**Sec. 48-2-56. Liens for taxes; priority.**—(a) Except as otherwise provided in this Code section, liens for all taxes due the state or any county or municipality in the state shall arise as of the time the taxes become due and unpaid and all tax liens shall cover all property in which the taxpayer has any interest from the date the lien arises until such taxes are paid.

\* \* \* \*

(e) The lien for taxes imposed by the provisions of Article 2 of Chapter 7 of this title, relating to certain income taxes, shall:

(1) Arise and cover all property of the taxpayer as of the time a tax execution for these taxes is entered upon the general execution docket; and

(2) Not be superior to the lien of a prior recorded instrument securing a bona fide debt. Before the lien provided for in this subsection shall attach to real property it shall be recorded in the county where the real property is located.

\* \* \* \*

**Sec. 48-2-81. Duties of sheriffs, tax collectors, etc., as to collection of taxes and prosecution of violators; payment of portion of fines to informants.**—It shall be the duty of all sheriffs, deputies, and constables to enforce the collection of all taxes that may be due the state under any law. It shall be the duty of all tax collectors, tax commissioners, sheriffs, and constables to make sure that all persons violating any of the tax laws of this state are prosecuted for all such violations. One-fourth of the fines imposed upon persons convicted of violating any tax law of this state upon the information of any citizen of this state shall be paid to the informant by order of the court.

\* \* \* \*

**Sec. 48-7-2. Failure of person to pay tax, file return, keep records, etc., under this chapter; penalty.**—(a) It shall be unlawful for any person who is required under this chapter to pay any tax, make any return, keep any records, supply any information, or exhibit any books or records for the purpose of computation, assessment, or collection of any tax imposed by this chapter to fail to:

- (1) Pay the tax;
- (2) Make the return;
- (3) Keep the records; or
- (4) When requested to do so by the commissioner:
  - (A) Supply the information; or
  - (B) Exhibit the books or records.

(b) In addition to other penalties provided by law, any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor.

\* \* \* \*

**Sec. 48-7-5. Evasion of income tax, penalty, interest, or other amount in excess of \$3,000.00.**—Any person who willfully evades or defeats or willfully attempts to evade or defeat, in any manner, any income tax, penalty, interest, or other amount in excess of \$3,000.00 imposed under this chapter, including but not limited to failure to file a return or report, shall, in addition to any other criminal or civil penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000.00 in the case of an individual or not more than \$500,000.00 in the case of a corporation or imprisoned not less than one nor more than five years, or both. Conduct proscribed by this Code section shall be subject to punishment under this Code section notwithstanding the applicability to such conduct of any other provision of law.

\* \* \* \*

**Sec. 48-7-82. Periods of limitation on assessment and collection; income received during decedent's lifetime, by estate, or by corporation; omissions from gross income; collection by execution; agreements to assessments after expiration of statutory period; taxpayer's notification of commissioner of change in net income by Internal Revenue Service; assessment; effect of failure to notify.**—(a) Except as otherwise provided in this Code section, the amount of income tax imposed by this chapter shall be assessed within the time period specified in Code Section 48-2-49.

\* \* \* \*

(e)(1) When a taxpayer's amount of net income for any year under this chapter as returned to the United States Department of the Treasury is changed or cor-

rected by the commissioner of internal revenue or other officer of the United States of competent authority, the taxpayer, within 180 days after final determination of the changed or corrected net income, shall make a return to the commissioner of the changed or corrected income, and the commissioner shall make assessment or the taxpayer shall claim a refund based on the change or correction within one year from the date the return required by this paragraph is filed. If the taxpayer does not make the return reflecting the changed or corrected net income and the commissioner receives from the United States government or one of its agents a report reflecting the changed or corrected net income, the commissioner shall make assessment for taxes due based on the change or correction within five years from the date the report from the United States government or its agent is actually received.

(2) In the event the taxpayer fails to notify the commissioner of the final determination of his United States income taxes, the commissioner shall proceed to determine, upon evidence that the commissioner has brought to his attention or that he otherwise acquires, the corrected income of the taxpayer for the fiscal or calendar year. If additional tax is determined to be due, the tax shall be assessed and collected. If it is determined that there has been an overpayment of tax for the year, the taxpayer, by his failure to notify the commissioner as required in paragraph (1) of this subsection, shall forfeit his right to any refund due by reason of the change or correction. A taxpayer who so fails to notify the commissioner, however, shall be entitled to equitable recoupment of 90 percent of any overpayment so determined against any additional tax liability so determined, the remaining 10 percent of the overpayment being totally forfeited as a penalty for failure to make a return as required by paragraph (1) of this subsection.

\* \* \* \*



**Sec. 48-7-86. Penalty for failure to pay or for underpayment of taxes; rate; reductions of tax by partial payments and credits; penalty for nonpayment after notice and demand; maximum penalty; maximum additions; "underpayment" defined; penalties for underpayments due to disregard of rules or to fraud.**—(a)(1) In case of failure to pay:

(A) The amount shown as tax on a return on or before the date prescribed for payment of the tax, such date to be determined with regard to any extension of time for payment, there shall be added to the amount of tax required to be shown on the return one-half of 1 percent of the amount of the tax if the failure is for not more than one month and with an additional one-half of 1 percent for each additional month or fraction of a month during which the failure continues. For the purposes of this subparagraph, the amount of tax shown on the return shall be reduced, for the purpose of computing the addition for any month, by the amount of any part of the tax which is paid on or before the beginning of the month and by the amount of any credit against the tax which is claimed on the return;

(B) Any amount in respect of any tax required to be shown on a return which is not so shown within ten days of the date of the notice and demand for the payment, the amount of tax stated in the notice and demand shall be increased by one-half of 1 percent of the amount of the tax if the failure is for not more than one month and by an additional one-half of 1 percent for each additional month or fraction of a month during which the failure continues. For the purposes of this subparagraph, the amount of tax stated in the notice and demand shall be reduced, for the purpose of computing the addition for any month, by the amount of any part of the tax which is paid before the beginning of the month.

(2) No penalty shall be assessed pursuant to this subsection which exceeds in the aggregate 25 percent of the amount of the tax or when it is shown that the failure is due to reasonable cause and not due to willful neglect.

\* \* \* \*

(d) For purposes of subsections (e) and (f) of this Code section, the term "underpayment" means a deficiency as defined in Code Section 48-7-1.

(e) If any part of any underpayment of tax required to be shown on a return is due to a negligent, or intentional disregard of rules and regulations, but without intent to defraud, an amount equal to 5 percent of the underpayment shall be added to the tax.

(f) If any part of any underpayment of tax required to be shown on a return is due to fraud, an amount equal to 50 percent of the underpayment shall be added to the tax. This amount shall be in lieu of any amount determined under subsection (e) of this Code section. If any penalty is assessed under this subsection for an underpayment of tax which is required to be shown on a return, no penalty under Code Section 48-7-57 or subsection (a) of this Code section shall be assessed with respect to the same underpayment.

\* \* \* \*

**Sec. 48-7-114. Declaration of estimated income tax by individuals; procedures.**—(a) "*Estimated tax*" defined. For purposes of this Code section, the term "estimated tax" means the amount which the individual estimates as the amount of income tax imposed by Code Section 48-7-20 less the amount which the individual estimates as the sum of credits allowable by law against the tax.

(b) *Requirement of estimated tax.* Except as otherwise provided in subsection (d) of this Code section, every resident individual and every taxable nonresident individual shall file of his estimated tax for the current



taxable year if he can be reasonably expected to be required to file a Georgia income tax return for the current taxable year . . .

\* \* \* \*

**Sec. 48-7-115. Time for filing declarations of estimated income tax by individuals.**—(a) *In general.* Estimated tax required by Code Section 48-7-114 from an individual not regarded as a farmer or fisherman shall be filed with the commissioner on or before April 15 of the taxable year, except that if the requirements of subsection (b) of Code 48-7-114 are first met:

(1) On or after April 1 and before June 1 of the taxable year, the estimated tax shall be filed on or before June 15 of the taxable year;

(2) On or after June 1 and before September 1 of the taxable year, the estimated tax shall be filed on or before September 15 of the taxable year; or

(3) On or after September 1 of the taxable year, the estimated tax shall be filed on or before January 15 of the succeeding year.

\* \* \* \*

**Sec. 48-7-120. Failure by taxpayer to pay estimated income tax.**—(a) *Addition to the tax.* In case of any underpayment of estimated tax by a taxpayer, except as provided in subsection (d) of this Code section, an amount computed at the rate of 9 percent per annum upon the amount of the underpayment, determined under subsection (b) of this Code section, for the period of this underpayment, determined under subsection (c) of this Code section, shall be added to the tax under Code Section 48-7-21 for the taxable year.

\* \* \* \*

(e) *Application to individual.* For purposes of applying this Code section in the case of an individual:

(1) The estimated tax shall be computed without any reduction for the amount which the individual estimates as his credit under subsection (a) of Code Section 48-7-112; and

(2) The amount of the credit allowed under subsection (a) of Code Section 48-7-112 for the taxable year shall be deemed a payment of estimated tax, and an equal part of the amount shall be deemed paid on each installment date as determined under Code Section 48-7-116 for the taxable year. If the taxpayer establishes the dates on which all amounts were actually withheld, the amounts so withheld shall be deemed payments of estimated tax on the dates on which the amounts were actually withheld.

\* \* \* \*

**Sec. 48-7-121. Credit of estimated tax payment; credit or refund of estimated tax overpayment; rate of interest on refund; time.**—(a) The amount of estimated tax paid under this article for any taxable year shall be allowed as a credit to the taxpayer against the taxpayer's income tax liability under Code Section 48-7-20 or 48-7-21 for the taxable year.

(b) To the extent that the estimated tax credit, together with other credits allowed by law, is in excess of the taxpayer's income tax liability for a taxable year as shown on an income tax return filed by the taxpayer for that year, the overpayment shall be considered as taxes erroneously paid and shall be credited or refunded as provided in this subsection. The overpayment shall be credited to the taxpayer's estimated income tax liability for the succeeding taxable year unless the taxpayer claims a refund for the overpayment. The commissioner may consider any final return showing an overpayment as a claim for refund per se. An overpayment shall bear no interest if credit is given for the overpayment. Amounts refunded as overpayments shall bear interest at the rate of 9 percent per annum but only after 90 days from the filing date of

the final return showing the overpayment or 90 days from the due date of the final return, whichever is later.

\* \* \* \*

#### Sec. 48-16-12

\* \* \* \*

(b) In addition to all other penalties provided under this chapter and any other law, any person who willfully fails to make a return or willfully makes a false return or conspires to do so, or who willfully fails to pay taxes owing, withheld, or collected, with intent to evade payment of the tax owed or the amount withheld or collected, or any part thereof, or who conspires to do so shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than three years or by a fine of not more than \$5,000.00, or both.

\* \* \* \*

#### 48-2-55 Attachment and garnishment; levy.

(a) All taxes are a personal debt of the person required by this title to file the returns or to pay the taxes imposed by this title.

(b)(1) The commissioner or his authorized representative may attach the property of a delinquent taxpayer on any ground provided by Code Section 18-3-1 or on the ground that the taxpayer is liquidating his property in an effort to avoid payment of the tax.

(2) The commissioner or his authorized representative may use garnishment to collect any tax, fee, license, penalty, interest, or collection costs due the state which are imposed by this title or which the commissioner or the department is responsible for collecting under any other law. Garnishment may be issued by the commissioner or his authorized representative against any person whom he believes to be indebted to the defendant or who has property, money, or effects in his hands belonging to the de-

fendant. The summons of garnishment shall be served by the commissioner or his authorized representative, shall be served at least 15 days before the sitting of the court to which the summons is made returnable, and shall be returned to either the superior court or the state court of the county in which the garnishee is served. The commissioner or his authorized representative shall enter on the execution the names of the persons garnished and shall return the execution to the appropriate court. All subsequent proceedings shall be the same as provided by law regarding garnishments in other cases when judgment has been obtained or execution issued.

(c)(1) In case of neglect or refusal by a taxpayer to pay any taxes, fees, licenses, penalties, interest, or collection costs due the state, the commissioner or his authorized representative may levy upon all property and rights to property belonging to the taxpayer, except such as are exempt by law, for the payment of the amount due, together with interest on the amount, any penalty for nonpayment, and such further amount as shall be sufficient for the fees, costs, and expenses of the levy. As used in this subsection, the term "property and rights to property" includes, but is not limited to, any account in or with a financial institution.

(3)  
No. 93-908

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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CHARLES J. REICH,  
*Petitioner,*

v.

MARCUS E. COLLINS, *et al.*

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On Petition for a Writ of Certiorari to the  
Supreme Court of Georgia

---

**BRIEF AMICUS CURIAE OF THE NATIONAL  
ASSOCIATION OF RETIRED FEDERAL EMPLOYEES  
IN SUPPORT OF PETITIONER**

---

MICHAEL J. KATOR \*  
KATOR, SCOTT & HELLER  
1275 K Street, N.W.  
Suite 950  
Washington, D.C. 20005-4006  
(202) 898-4800

January 7, 1994

\* Counsel of Record



## **QUESTIONS PRESENTED**

1. Whether the Fourteenth Amendment requires states to provide a postdeprivation refund remedy if they impose economic and criminal sanctions against taxpayers who seek to challenge the validity of state taxation prior to paying the taxes.

2. Whether a state violates the Fourteenth Amendment when it deprives a taxpayer of all existing rights to seek a tax refund under existing statutory and case law.

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**BRIEF AMICUS CURIAE OF THE NATIONAL  
ASSOCIATION OF RETIRED FEDERAL EMPLOYEES  
IN SUPPORT OF PETITIONER**

---

The National Association of Retired Federal Employees ("NARFE") files this brief *amicus curiae* in support of petitioner and urges this Court to grant the petition for a writ of certiorari to the Supreme Court of Georgia.

**INTEREST OF AMICUS**

NARFE is a nonprofit incorporated association having its principal place of business in Washington, D.C. From its original fourteen chapter members, NARFE has grown to a membership of approximately a half million federal annuitants (retirees and survivors) living through-

out the Nation and in various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and it has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

While NARFE principally focuses on legislative and administrative issues affecting federal retirees, on a handful of occasions, either directly or as *amicus*, NARFE has been involved in litigation in this Court. Most recently, NARFE has been involved in the litigation emanating from the states' discriminatory taxation of federal retirement benefits. Because this discriminatory taxation practice was widespread, NARFE participated as *amicus* in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). Similarly, NARFE members brought the case of *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), which challenged states' reliance on nonretroactive decisionmaking to deny refunds to federal retirees who had paid the taxes invalidated by *Davis*.

This case represents the third generation of *Davis* litigation. After this Court invalidated the discriminatory taxation in *Davis*, most states invoked nonretroactivity to deny refunds. Since *Harper* debunked that defense, states have fallen back to arguing that federal retirees had adequate predeprivation opportunities to challenge the taxation and, accordingly, they have no constitutional entitlement to relief. This case thus raises the question, left open in *Harper*, of whether "federal law . . . necessarily entitle[s] the retirees] to a refund." *Harper*, 113 S. Ct. at 2520.

The majority of the 23 states that imposed *Davis*-type taxes have now refunded (or agreed to refund) those taxes to the federal retirees. Several states, however, are continuing their efforts to avoid their obligations to refund the taxes they unconstitutionally imposed on federal re-

tirees. NARFE and its members in these remaining states are vitally interested in seeing that this litigation is finally put to rest and that refunds are finally paid. Moreover, because the issues raised in this petition affect the ability to recoup all types of unlawful taxes, NARFE and its members nationwide are interested in assuring that states cannot stack the deck against them and other taxpayers who seek refunds of erroneously or unlawfully collected taxes.<sup>1</sup>

### STATEMENT

For over a decade, federal retirees in Georgia have been struggling to obtain refunds of the taxes improperly imposed by that State on their federal pensions. Their initial efforts to obtain this relief in federal court were thwarted on Tax Injunction Act grounds—the Eleventh Circuit held that Georgia's various procedures for challenging taxes, including its refund statute, provided a "plain, speedy and efficient" remedy that divested the federal courts of jurisdiction. *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986). Remitted to the state courts, the federal retirees have found that Georgia's remedies for the deprivation they have suffered are anything but plain, speedy and efficient.

In state court, the federal retirees first sought to obtain declaratory and injunctive relief preventing the state from collecting the unconstitutional tax for the 1988 tax year. In *Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E. 2d 74, 75 n.1 (1989), the court below held that this relief was unavailable because Georgia's refund statute provided an "adequate remedy" thus precluding the extraordinary injunctive relief sought.

Taking their cue from *Collins v. Waldron*, the federal retirees next sought to obtain refunds of the unconstitu-

<sup>1</sup> Counsel for petitioner and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.

tional taxes under Georgia's tax refund statute, O.C.G.A. § 48-2-35. After exhausting their administrative remedies, federal retirees throughout the state filed suits seeking refunds of the taxes imposed on their pensions between 1985 and 1988. This effort was rebuffed in *Reich v. Collins*, 262 Ga. 625, 422 S.E. 2d 846 (1992), *vacated*, 113 S. Ct. 3028, 3039 (1993) (*Reich I*). In *Reich I* the court below held that Georgia's refund statute<sup>2</sup>

contemplates the situation where a taxing authority erroneously or illegally assessed and collects a tax under a valid law [but not] the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid.

*Reich I*, 262 Ga. at 628-29, 422 S.E. at 849.

This Court vacated and remanded *Reich I* for consideration of *Harper's* mandate that federal Due Process requires "meaningful backward-looking relief" for all taxpayers when the state does not provide adequate predeprivation process. 113 S. Ct. at 2519-20. On remand, the court below concluded that Georgia does provide its taxpayers adequate predeprivation remedies. Relying on its tandem decision in *James B. Beam Distilling Co. v. Georgia*, Nos. S93A1217, S93SA1218 (Ga. Dec. 2, 1993) (WESTLAW: 1993 WL 503244),<sup>3</sup> the court held that Georgia's

<sup>2</sup> O.C.G.A. § 48-2-35(a) provides that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state."

<sup>3</sup> After remand from this Court, the court below concluded that the *James B. Beam Distilling Co.* lacked standing to seek refunds under Georgia's refund statute. *Beam*, 1993 WL 503244 at \*2. Contrary to the explicit holding in *Reich I*, and the implicit holding of the decision below, the court "assumed" that the refund statute reached the taxation in dispute. *Beam*, 1993 WL 503244 at \*5 n.3. The court did not, however, explain why the refund statute was applicable to liquor wholesalers but not federal retirees.

declaratory judgment remedies . . . as well as statutory injunctive relief remedies . . . provide meaningful opportunities to taxpayers to litigate the validity of taxes alleged owing prior to the time when the taxes fall due.

Pet. App. at 4a (footnote omitted). The court further noted that relief was available under Georgia's Administrative Procedure Act as well as another statutory remedy that allowed taxpayers to proceed directly to court without exhausting any administrative remedies. Pet. App. 4a-5a.

While these routes may indeed be available to Georgia taxpayers, significantly, none protects a taxpayer from the imposition of financial and criminal sanctions. Thus the issue in this case is squarely framed: are the remedies available under Georgia's statutes sufficiently free of duress to excuse Georgia from its obligation to provide a post-deprivation refund remedy? Because Georgia's statutes are typical of many states, resolution of this question is necessary to give meaning to *Harper* and to the Fourteenth Amendment's mandate to protect taxpayers from unconstitutional state taxation.

#### REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the rights of taxpayers to obtain refunds of taxes unconstitutionally or illegally imposed upon them. In Georgia alone this case implicates the rights of over 100,000 federal retirees. In perhaps as many as ten other states, resolution of this question could determine whether states may retain hundreds of millions of dollars of taxes unconstitutionally imposed on federal annuitants.

Moreover, the issues in this case have far-reaching consequences that eclipse their impact on federal retirees. The mandate of *Harper* is not limited to federal retirees—the



issue of the adequacy of state predeprivation remedies has arisen and will continue to arise in a broad array of state tax cases. Every other state court of last resort that has considered the scope of *Harper's* mandate has reached conclusions vastly different from that reached by the court below. Accordingly, review by this Court is necessary to assure that the dictates of federal due process are applied uniformly and do not vary from state to state.

Finally, recent tax litigation has shown that financial considerations tend to make the doctrine of *stare decisis* more pliable in some courts than it might otherwise be. Presumably in an effort to protect states from the fiscal consequences of retroactive invalidation of taxes, some state courts have adopted attenuated constructions of state refund procedures by bending or ignoring precedents. This case presents the additional question whether the Fourteenth Amendment serves as a bulwark in such cases, preventing courts from eliminating preexisting remedies simply because following precedent might prove expensive. Review by this Court necessary to signal that the Constitution precludes state courts from depriving citizens of their property by changing the rules in the middle of the game.

1. Since this Court decided *Harper* last Term, three state supreme courts have issued opinions requiring refunds of their states' unconstitutionally imposed taxes. See *Hagge v. Iowa Department of Revenue and Finance*, 504 N.W.2d 448, 452 (Iowa 1993); *Brumley v. Utah State Tax Comm'n*, No. 910242 (Utah Sept. 2, 1993) (WESTLAW: 1993 WL 333583) (petition for reh'g pending); *Strelecki v. Oklahoma Tax Comm'n*, No. 77615 (Okla. Sept. 28, 1993) (WESTLAW: 1993 WL 379008) (petition for reh'g pending). Three other states, Montana, Arkansas and South Carolina, have agreed to pay the refunds.

Notwithstanding that the tide has decisively turned in the retirees' favor, several states continue to pursue their

war of attrition against the federal retirees. In both Oklahoma and Utah, for example, the states have sought rehearing arguing, among other things, that existing predeprivation remedies absolve them of their duty to provide refunds. Similarly, this is the principal issue being advocated on remand in *Harper* and in *Duffy v. Wetzler*, 113 S. Ct. 3027 (1993), *on remand*, Nos. 90-07800, 91-02056 (Supreme Court of N.Y. Appellate Div., 2d Dept.). In *Barker v. Kansas*, 112 S. Ct. 1619 (1992), *on remand*, No. 89-CV-666 (Dist. Ct. for Shawnee Cty., Div. 4), the state continues to resist paying refunds, even refunds of taxes imposed *after Davis* was decided, arguing that Kansas' declaratory and injunctive relief provisions excuse it from paying refunds. This identical argument is being made in the Supreme Court of Mississippi and in the various tribunals in Wisconsin in which the *Davis* litigation is there pending.

The arguments being advanced in these states are utterly irreconcilable with *Harper*. This Court held in *Harper* that a state incurs the obligation to provide "meaningful backward-looking relief" when "it places taxpayers under duress to pay a tax when due"; *i.e.*,

when it "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before* their objections are entertained or resolved."

113 S. Ct. at 2519-20 & n.10, quoting *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 and 38 (1990). Thus, in *McKesson*, because Florida imposed financial sanctions against taxpayers who sought to enjoin the imposition of the disputed tax, 496 U.S. at 37-39 & n.20, it was obligated to provide postdeprivation remedies. See also *O'Connor v. Atchison T. & S.F.R. Co.*, 223 U.S. 280, 286-87 (1912) (in order to challenge a tax's validity "the plaintiff . . . was not called upon to take the risk of having its contracts disputed and its business injured, and of finding the

tax more or less nearly doubled in case it finally had to pay.").

Other than the court below, all the state courts of last resort that have addressed this question have rejected the argument that putative predeprivation remedies excused the state from refunding the unconstitutionally imposed taxes. In *Hagge*, for example, the court specifically rejected the state's plea that there existed adequate predeprivation means by which the federal retirees could have pressed their claims. The court held that because Iowa imposed penalties for nonpayment of taxes and created a statutory lien against delinquent taxpayers' property, the taxes were paid under duress and the state was thus constitutionally obligated to provide taxpayers a postdeprivation remedy. 479 N.W. 2d at 451. Similarly, in *Strelecki*, the court held that Oklahoma's declaratory and injunctive relief provisions did not "afford [taxpayers] an adequate opportunity to secure relief from the burden imposed by a constitutionally infirm tax statute." 1993 WL 379008 at \*8.

Thus the state courts of last resort are split on whether declaratory and injunctive relief encumbered with financial and criminal sanctions constitute adequate predeprivation procedures sufficient to excuse a state from providing a postdeprivation remedy. Absent guidance from this Court, federal retiree's rights under the Fourteenth Amendment will continue to be determined inconsistently on a state-by-state basis. Review by this Court is thus necessary to assure that the Fourteenth Amendment is applied uniformly to all federal retirees in all states.

2. The question of whether putative predeprivation remedies satisfy the requirements of the Fourteenth Amendment is not, of course, limited to *Davis* litigation. The decision below, for example, is predicated on the Georgia Supreme Court's holding in *Beam*, which involved a liquor distributor's challenge to a discriminatory tax under the Commerce Clause. See also *West Virginia ex rel.*

*Paige v. Canady*, 434 S.E.2d 10, 13 (W. Va. 1993) (recognition in Commerce Clause case that taxpayers subjected to duress are constitutionally entitled to refunds).

Not only has the question presented here arisen in different tax litigation, significantly, it has received different answers. For example, in *Service Oil Inc. v. North Dakota*, 479 N.W.2d 815, 821-22 (N. Dak. 1992), the court held that, notwithstanding the availability of injunctive relief, North Dakota's tax scheme did not provide taxpayers with adequate predeprivation relief. The court held that because North Dakota's tax provisions gave the Tax Commissioner authority to impose penalties up to five per cent of the tax due plus interest at the rate of one percent per month,

North Dakota provisions do not, as a matter of federal constitutional law, provide North Dakota taxpayers with a meaningful opportunity to withhold payment and obtain a predeprivation determination of the validity of this discriminatory tax.

*Id.*, 479 N.W.2d at 823.

The penalties Georgia imposes on taxpayers who withhold payment are far more onerous than North Dakota's. For example, Georgia imposes a penalty up to 25% of the tax due along with interest at the rate of one percent per month. See O.C.G.A. §§ 48-7-86, 48-2-40. In addition, Georgia subjects taxpayers who withhold their taxes to criminal sanctions, and it places an affirmative obligation on all tax commissioners and sheriffs to prosecute delinquent taxpayers. O.C.G.A. §§ 48-7-2, 48-16-12(b); § 48-2-81.

In *Beam*, the court below held that the state's authority to impose penalties "is not a financial sanction tantamount to an attempt to secure payment of taxes under duress since the penalties are subject to waiver by the revenue commissioner." *Id.* at 1993 WL 503244 \*3. But to say that the sanctions are "subject to waiver" is to say that a taxpayer who withholds payment is subject to the risk



that these sanctions will be imposed. The risk of imposition of sanctions is the *sine qua non* of duress. See *O'Connor v. Atchison T. & S.F.R. Co.*, 223 U.S. at 286-87 (taxpayer is subject to duress if "called upon to take the risk" of sanctions). See also *Service Oil*, 479 N.W.2d at 822 (holding North Dakota's predeprivation remedies inadequate notwithstanding that "[t]he commissioner, for good cause shown, may waive all or any part of the penalty or interest.").

Thus, absent review by this Court, the Due Process Clause will continue to have different meanings in different states. In North Dakota, the risk that withholding taxes will garner penalties and interest is sufficient to require that the state provide a postdeprivation remedy. In Georgia, the risk is also present, yet a different rule applies—no taxpayer can challenge a tax unless he or she is prepared to bear the risk of seizure of property or imprisonment. Review by this Court is necessary to assure that there is but one standard for determining when the possible imposition of penalties subjects taxpayers to "constitutionally significant duress." *Harper*, 113 S. Ct. at 2519-20 n.10.

3. In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), this Court held that the state court violated the Due Process Clause by judicially depriving the taxpayer of all available remedies for challenging the validity of a tax. Specifically, the Court held that a taxpayer has a property interest in a remedy procedure, and this property interest is protected by the Due Process Clause:

Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

*Id.*, 281 U.S. at 682 (footnotes and citations omitted).

The facts in *Brinkerhoff-Faris* are strikingly similar to the case at bar. There, a taxpayer brought a suit in state court alleging that it was being taxed unconstitutionally. The state supreme court denied relief by reversing settled law and holding that the taxpayer should have followed a predeprivation procedure before the tax commissioner. At the time of that holding, it was too late for the taxpayer to pursue the predeprivation remedy. The Court held that the taxpayer had a property interest in the remedy that it did pursue, and the state could not revoke that remedy after the fact, at a time when the taxpayer had no other remedy available. *Id.*, 281 U.S. at 682.

The federal retirees are in precisely the same situation as the taxpayer in *Brinkerhoff-Faris*. At the time they elected to pursue the refund remedy under O.C.G.A. § 48-2-35, it was settled law that refunds were available in the situation at issue in this case. *Collins v. Waldron*, 259 Ga. at 583, 385 S.E.2d at 75 n.1; *Henderson v. Carter*, 229 Ga. 876, 878, 195 S.E.2d 4, 6 (1972); *Wright v. Forrester*, 192 Ga. 864, 867, 16 S.E.2d 873, 875 (1973). Therefore, they have a property interest in the remedy they elected—refunds pursuant to O.C.G.A. § 48-2-35—and the lower court's decision extinguishing that right at a time when federal retirees had no other remedy available violated the Due Process Clause. *Brinkerhoff-Faris*, 281 U.S. at 682.<sup>4</sup>

<sup>4</sup> Like the situation here, *Brinkerhoff-Faris* dealt with a remedy procedure that had previously been sanctioned by the state supreme court. This is by no means, however, the only way a protectable property interest can arise. Protectable property interests can arise in a wide variety of ways, including legislative enactments, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 543 (1985), case law, *Brinkerhoff-Faris*, and other sources. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests "are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law . . ."). Thus, irrespective of whether the federal retirees' property interest in the remedies provided by the refund statute arose out of the plain language of the statute, 50 years of judicial precedent, or



The court below has expediently shuffled and reshuffled the remedies that supposedly are available to Georgia taxpayers. First, in dissolving the injunctive relief the federal retirees obtained for the 1988 taxes, the court below held that Georgia's refund statute provided relief. Then, when the federal retirees sought relief under the refund statute, the court below concluded that that statute did not apply. The court "t[ook] this opportunity," 262 Ga. at 629, 422 S.E. 2d at 849, to create an entirely new remedy: the federal retirees were only entitled to a refund if they had paid their taxes under protest. Now, after remand of this case and *Beam*, and without any mention of payment under protest, the court below assumes that the refund statute applies to the taxpayers in *Beam* (who do not have standing under that statute), but it does not apply to federal retirees (who indisputably would have standing under that statute).

To be sure, the court below is the final arbiter on issues of Georgia state law. Were there no property interest at stake here, the lower court's result-oriented rulings would simply be injudicious and unseemly. But because the federal retirees have a property interest in the remedies Georgia has created, the Constitution prohibits the court below from taking the federal retirees' property. Review by this Court is necessary to assure that taxpayers' property interests cannot be so easily extinguished by facile interpretations of state law.

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an explicit holding by the court that the refund statute provided an adequate remedy at law for federal retirees affected by *Davis*, "the State may not finally destroy [that] property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 (1982).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Georgia should be granted. Moreover, because the opinion below is in irreconcilable conflict with *Harper, McKesson and O'Connor v. Atchison T. & S.F.R. Co.*, this Court should summarily reverse. See, e.g. *El Vocero de Puerto Rico (Caribbean International News Corp.) v. Puerto Rico*, 113 S. Ct. 2004, 2006 (1993) (granting petition for certiorari and reversing judgment below); *United States v. Nachtigal*, 113 S. Ct. 1072, 1074 (1993) (same).

Respectfully submitted,

MICHAEL J. KATOR \*  
KATOR, SCOTT & HELLER  
1275 K Street, N.W.  
Suite 950  
Washington, D.C. 20005-4006  
(202) 898-4800

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\* Counsel of Record

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No. 93-908

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1993

CHARLES J. REICH,

*Petitioner,*

vs.

MARCUS E. COLLINS AND THE GEORGIA  
DEPARTMENT OF REVENUE,

*Respondents.*

On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Georgia

**BRIEF AMICI CURIAE FOR DESIGNATED FEDERAL  
RETIREES IN KANSAS, NEW YORK AND OKLAHOMA  
IN SUPPORT OF PETITIONER**

John C. Frieden  
Kevin M. Fowler\*  
FRIEDEN, HAYNES & FORBES  
400 S.W. 8th, Suite 409  
Topeka, KS 66603  
(913) 232-7266

*\*Counsel of Record for  
Amici Curiae*

Kenton C. Granger  
Raymond L. Dahlberg  
NIEWALD, WALDECK &  
BROWN, P.C.  
9401 Indian Creek Pkwy  
Corporate Woods Bldg 40  
Suite 550  
Overland Park, KS 66225  
(913) 451-1717

[Additional Counsel Listed on Inside Cover]

The Standard-Hart Printing Co., Inc.

22 PP

Roger M. Theis  
9411 Shannon Way Court  
Wichita, KS 67206  
(316) 634-0418

Robert J. Costello  
PHELAN & COSTELLO, P.C.  
One Penn Plaza, Suite 4310  
New York, NY 10119  
(212) 868-3000

Terence A. Lober  
1117 Cherokee Street  
Leavenworth, KS 66048  
(913) 682-3822

Kevin "D" Watley  
224 West Gray Street  
Norman, OK 73069  
(405) 321-5858

*Counsel for Amici Curiae*



**QUESTION PRESENTED**

Whether the availability of declaratory, injunctive or administrative relief from illegal state income taxation eliminates Georgia's obligation under the Fourteenth Amendment to provide meaningful backward-looking relief to federal retirees who paid the tax to avoid potential financial sanctions and summary remedies.

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---

On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Georgia

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**BRIEF AMICI CURIAE FOR DESIGNATED FEDERAL  
RETIREES IN KANSAS, NEW YORK AND OKLAHOMA  
IN SUPPORT OF PETITIONER**

---

Designated federal retirees from the States of Kansas, New York and Oklahoma file this brief *amicus curiae* in support of the petitioner and request this Court to grant the petition for a writ of certiorari to the Supreme Court of the State of Georgia.

**INTEREST OF THE AMICI CURIAE**

*Amici* are the petitioners in *Barker v. Kansas*, 112 S.Ct. 1619 (1992), *on remand*, Nos. 89-CV-666 and 89-CV-1100 (Dist. Ct. Shawnee Cty., Kan., Div. IV); the appellants in *Duffy v.*

*Wetzler*, 555 N.Y.S.2d 543 (N.Y. Sup. Ct. 1990), *aff'd as modified*, 174 A.D.2d 253, 579 N.Y.S.2d 684 (N.Y. App. Div.), *appeal dismissed*, 79 N.Y.2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (N.Y. 1992), *cert. granted, vacated, and dismissed*, 113 S.Ct. 3027 (1993), *on remand*, Nos. 90-07800 and 91-02056 (N.Y. Sup. Ct.); and the appellants in *Strelecki v. Oklahoma Tax Comm'n*, \_\_\_ P.2d \_\_\_ (Okla., Sept. 28, 1993) (No. 77,615), *pet. for rehearing filed* (Oct. 18, 1993).<sup>1</sup>

*Amici* are retired military and civilian employees of the United States involved in ongoing state court litigation which presents the federal question raised here. *Barker* and *Duffy* are both on remand from this Court. Kansas, New York and Oklahoma contend that the availability of declaratory, injunctive or administrative relief from state income taxation which violates 4 U.S.C. § 111 eliminates any obligation under the Fourteenth Amendment to provide meaningful backward-looking relief to federal retirees who paid the tax to avoid financial sanctions and summary remedies. The ultimate disposition of this issue will have a decided impact on the constitutional rights of *amici* and retired federal employees in other States which have refused to enforce the clear mandates of *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993), *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990), and their predecessors. Therefore, *amici* have a salient and compelling interest in proper resolution of the principal question presented in this case.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. In pertinent part, Section 1 of the Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

<sup>1</sup> Set forth in Appendix A is a complete list of all *amici*. The written consents of the parties to the filing of this brief *amici curiae* have been filed with the Clerk of the Court.

2. In pertinent part, 4 U.S.C. § 111 provides:

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of pay or compensation.

#### REASONS FOR ALLOWING THE WRIT

This case presents an important and recurring federal question with far-reaching impact: whether the availability of declaratory, injunctive or administrative relief from state income taxation which violates 4 U.S.C. § 111 eliminates any obligation under the Fourteenth Amendment to provide meaningful backward-looking relief to federal retirees who paid the tax to avoid potential financial sanctions and summary remedies. State courts of last resort have delivered conflicting opinions on this issue and further divergence is inevitable. Therefore, review on writ of certiorari is necessary to resolve existing conflict among the states and to ensure national uniformity in federal constitutional law. Such review is also necessary to enforce controlling principles of due process ignored by the Georgia Supreme Court.

#### I. THE FEDERAL QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT TO PROVIDE AUTHORITY TO ALL STATES OF THE UNION

##### A. The Opinion Below Directly Conflicts With Decisions of Other State Courts of Last Resort

The Georgia Supreme Court held that federal retirees are not entitled to any backward-looking relief from state income taxes exacted in violation of 4 U.S.C. § 111 because proceedings for declaratory, injunctive and administrative relief afforded them



meaningful "predeprivation" opportunities to challenge the validity of the tax before payment despite potential financial sanctions and summary remedies. *Compare* Pet.App. A at 4A-6A (meaningful predeprivation remedies before payment), *with id.* at 7A-14A (Carley, J., dissenting) (potential predeprivation remedies are not meaningful since retirees were subject to financial sanctions and summary remedies for nonpayment during the pendency of any challenge to the validity of the tax). This unpersuasive conclusion, however, directly conflicts with applicable decisions of the Supreme Courts of Iowa and North Dakota. *See Hagge v. Iowa Dept. of Revenue and Finance*, 504 N.W.2d 448, 450-451 (Iowa 1993); *Service Oil, Inc. v. State*, 479 N.W.2d 815, 821-824 (N.D. 1992).<sup>2</sup>

In *Hagge*, a unanimous Iowa Supreme Court upheld the district court's conclusion that a federal retiree "had no 'real' predeprivation remedy" under *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990), since "'failure to pay the tax would have subjected him to even further difficulties.'" 504 N.W.2d at 450. The court seriously questioned whether an action for injunctive relief "would qualify as 'meaningful' under a *McKesson* analysis" and concluded that "tax payment in Iowa continues to be less 'voluntary' than under 'duress'" because of adjustable statutory penalties [e.g., 7% for failing to pay 90% of the tax due when filing the return], statutory interest on all unpaid taxes at a rate tied to prime, and tax liens on property for nonpayment. *Id.* at 450-451.

<sup>2</sup> In *Strelecki v. Oklahoma Tax Comm'n*, *supra*, the Oklahoma Supreme Court likewise rejected the State's argument that the failure of federal retirees to avail themselves of declaratory, injunctive and administrative relief provided an adequate basis to deny them any postdeprivation remedy under the Fourteenth Amendment. \_\_\_ P.2d at \_\_\_, slip op. at 17-19. Disposition of this issue in *Strelecki*, however, was not expressly based upon the existence of potential financial sanctions or summary remedies for nonpayment. Nevertheless, the result in *Strelecki* directly conflicts with the disposition of this issue in the opinion below.

In *Service Oil*, a unanimous North Dakota Supreme Court held that statutory procedures for declaratory and injunctive relief did not provide "taxpayers with a meaningful opportunity to withhold payment and obtain a predeprivation determination of the validity" of a discriminatory tax which violated the Commerce Clause since nonpayment would have subjected them to potential financial sanctions and summary remedies. 479 N.W.2d at 822-823. Such financial sanctions included a penalty equal to 5% of the unpaid tax and interest at the rate of 1% per month on the unpaid balance. *Id.* at 822. Following an extensive analysis of *McKesson*, the North Dakota Supreme Court held as a matter of federal constitutional law that the plaintiff's payment of discriminatory taxes on motor vehicle fuels was not voluntary and that the taxpayer was entitled to meaningful retroactive relief. *Service Oil*, 479 N.W.2d at 821-824.

Despite *Hagge* and *Service Oil*, which the opinion below fails to address or distinguish, the Georgia Supreme Court flatly refused to grant the taxpayers any form of "postdeprivation" relief although federal retirees in Georgia who withheld payment while challenging the validity of the tax would have risked the imposition of severe sanctions and summary remedies. In this regard, any federal retiree who failed to pay the Georgia income tax when due would have been subject to:

(i) misdemeanor criminal prosecution and the possibility of conviction [see Ga. Code Ann. § 48-7-2(a)(1) and (b) (1982)];

(ii) the assessment of interest on the unpaid balance at the rate of 12% per annum [see Ga. Code Ann. § 48-7-81(a) (1982) and Ga. Code Ann. § 48-2-40 (1991)];

(iii) the assessment of penalties at the rate of one-half of one percent (1/2 of 1%) per month or 6% per annum up to an aggregate of 25% of the amount of the unpaid tax [see Ga. Code Ann. §



48-7-86(a)(1) and (2) (1982 & Supp. 1993));

(iv) the garnishment of his or her wages for unpaid taxes, interest and penalties [see Ga. Code Ann. § 48-2-55(b)(2) (1991 & Supp. 1993)]; and

(v) the levy upon his or her "property and rights to property" for unpaid taxes, interest, penalties and the costs of the levy, as well as the judicial sale of real and personal property [see Ga. Code Ann. § 48-2-55(c) and (d) (1991 & Supp. 1993)].

Since the risk of comparable, albeit potentially less severe, financial sanctions and summary remedies in Iowa and North Dakota requires meaningful postdeprivation relief under the Fourteenth Amendment, the decision below has created an irreconcilable conflict between State courts of last resort which should be resolved on writ of certiorari.

**B. Review by This Court Is Necessary to Resolve Existing Conflict Among the States and to Avoid Additional Conflicting Decisions**

In view of constraints upon the jurisdiction of federal courts imposed by Eleventh Amendment jurisprudence, the Tax Injunction Act [28 U.S.C. § 1341] and considerations of comity, constitutional challenges to state taxes must ordinarily be pursued through state courts. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 122 (1984); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981).<sup>3</sup> Consequently, the writ of certiorari from this Court is the only

<sup>3</sup> Because of these limitations, federal retirees in Georgia have consistently been deprived of access to the federal courts to resolve their claims of unlawful income taxation and entitlement to meaningful relief. See *Waldron v. Collins*, 788 F.2d 736, 737-739 (11th Cir.), cert. denied, 479 U.S. 884 (1986); *Wetzel v. Collins*, No. 1:89-CV-758-ODE (N.D.Ga.) (Order, Sept. 26, 1990).

generally available means to resolve decisional conflicts between the State courts of last resort in state tax cases where precious federal constitutional rights are at stake. Review on writ of certiorari is, therefore, essential to resolve the existing conflict between the Supreme Courts of Iowa and North Dakota and the Supreme Court of Georgia, and to ensure national uniformity in the due process rights of state taxpayers under the Fourteenth Amendment. See *McKesson*, 496 U.S. at 28-29 (securing "state-court compliance with, and national uniformity of, federal law" are proper objectives of review.). Otherwise, the minimum requirements of federal due process will vary from state to state and the degree of Fourteenth Amendment protection afforded state taxpayers will depend solely upon their state of residence.

Authoritative guidance from this Court is also necessary to avoid further conflict among state courts regarding the rights of taxpayers, including federal military and civilian retirees, to fair and meaningful "postdeprivation" relief under the Fourteenth Amendment when challenged taxes have been paid to avoid potential financial sanctions and summary remedies. While this important issue may arise in any action which challenges the validity of a state tax on federal constitutional or statutory grounds, it is currently pending in state tax litigation which has arisen in the wake of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). In addition to the *Davis*-related cases in Kansas, New York and Oklahoma, questions involving the entitlement of federal retirees to fair and meaningful postdeprivation relief under the Fourteenth Amendment have also been raised in *Mississippi State Tax Comm'n v. Todd*, appeal pending, Nos. 91-CC-422, 91-CC-474, 91-CC-475 and 91-CC-476 (Miss.); *Gossum v. Commonwealth of Kentucky Revenue Cabinet*, appeal pending, No. 92-SC-1041-T (Ky.); *Wisconsin Dept. of Revenue v. Hogan*, petition for review pending, No. 93-CV-2549 (Cir. Ct. Dane Cty., Wis.); and *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993), on remand, No. CL891080 (Cir. Ct. City of Alexandria, Va.) (argued Oct. 21, 1993). Therefore, no fewer than seven (7) pending cases may be affected by the decision of the Georgia Supreme Court at issue here.

If the opinion below is not reviewed, other state courts might be inclined to hold that the availability of declaratory, injunctive or administrative relief from unlawful state taxation eliminates any obligation to provide fair or meaningful "postdeprivation" relief even when a State simultaneously utilizes the threat of financial sanctions and summary remedies to encourage taxpayers to make timely payments before resolution of any dispute over the validity of taxes. *But see Harper*, 113 S.Ct. at 2519-20 and n. 10; *McKesson*, 496 U.S. at 31, 37-39, and 51-52. Since "courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made," *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 286 (1912) (Holmes, J., unanimous opinion), the continued existence of conflict on this issue will encourage parochial decisionmaking and inevitably cause further divergence of opinion among state courts.

**II. THE DECISION BELOW CONFLICTS WITH THE REQUIREMENTS OF DUE PROCESS RECENTLY REITERATED IN *HARPER V. VIRGINIA DEPT. OF TAXATION*, 113 S.Ct. 2510 (1993) AND *MCKESSON CORP. V. FLORIDA ALCOHOL & TOBACCO DIV.*, 496 U.S. 18 (1990)**

In *Harper*, this Court emphasized that when a State does not offer a meaningful opportunity for taxpayers to withhold contested tax payments while challenging their validity in a predeprivation hearing, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." 113 S.Ct. at 2519 (quoting *McKesson*, 496 U.S. at 31). Writing for the *Harper* majority, Justice Thomas reiterated that "[a] State incurs this obligation when it 'places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality.'" 113 S.Ct. at 2519 n. 10 (quoting *McKesson*, 496 U.S. at 31).

While the opinion below does not address the circumstances under which the Fourteenth Amendment requires a State to provide taxpayers with a clear, certain and meaningful postdeprivation remedy, the *Harper* decision unequivocally explains:

A State that establishes various sanctions and summary remedies designed to prompt taxpayers to tender payments before their objections are entertained or resolved does not provide taxpayers a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity. Such limitations impose constitutionally significant duress because a tax payment rendered under these circumstances must be treated as an effort to avoid financial sanctions or a seizure of real or personal property.

113 S.Ct. at 2519 n. 10 (internal citations and punctuation omitted). *See also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930); *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 23-24 (1920); *O'Connor*, 223 U.S. at 286-287. Indeed, it has been long settled that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." *McKesson*, 496 U.S. at 38 n. 21. Under such circumstances, "[t]he State accordingly may not confine a taxpayer under duress to prospective relief." *Harper*, 113 S.Ct. at 2519 n. 10.

In *McKesson*, the taxpayer brought suit in Florida state court challenging a liquor excise tax which discriminated against interstate commerce and, therefore, violated the Commerce Clause. 496 U.S. at 22-23. The taxpayer sought declaratory and injunctive relief against continued enforcement of the discriminatory tax scheme and "a refund in the amount of the excess taxes it had paid as a result of its disfavored treatment." *Id.* at 24-25. While the taxpayer in *McKesson* secured both declaratory and injunctive



relief from unlawful state excise taxation, the Florida courts refused to award any postdeprivation relief. *Id.* at 25-26 and 31. On writ of certiorari, this Court unanimously concluded that the Florida Supreme Court erred in confining the taxpayer to prospective relief and reversed, reasoning that "if a State penalizes taxpayers for failure to remit their taxes in timely fashion \* \* \* the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson*, 496 U.S. at 22; *see also id.* at 31, 38-39 and 51-52.

While the State of Florida authorized taxpayers to seek declaratory and injunctive relief from unlawful taxation, this Court unanimously held in *McKesson* that the availability of such prospective remedies did not eliminate Florida's obligation to provide clear, certain and meaningful postdeprivation relief since the challenged excise taxes had been paid to avoid the potential imposition of financial sanctions [i.e., interest at the rate of 12% per annum and a penalty equal to 50% of the unpaid tax], and the potential seizure of property to satisfy any unpaid liability for taxes, interest and penalties. 496 U.S. at 37-39 and n. 20; *see also O'Connor*, 223 U.S. at 286 (taxpayers are not required "to take the risk" of adverse financial consequences or sanctions for nonpayment). Because these potential financial sanctions and summary remedies are "designed so that liquor distributors tend tax payments before their objections are entertained and resolved," *McKesson*, 496 U.S. at 38 (emphasis in original), the ability to secure declaratory or injunctive relief does not constitute a fair or meaningful predeprivation procedure.

As Justice Brennan explained for a unanimous court:

Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida requires taxpayers to raise their

objections to the tax in a postdeprivation refund action. To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' *O'Connor*, 223 U.S., at 285, for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

*McKesson*, 496 U.S. at 38-39 (footnotes omitted).

Despite the unequivocal teachings of *Harper* and *McKesson*, the opinion below significantly ignored the fact that federal retirees in Georgia who failed to pay the challenged income tax when due would have been subject to substantial disadvantages under state law. These law abiding citizens would have risked criminal prosecution (as well as conviction and incarceration) and the assessment of interest at the rate of 12% per annum and penalties up to 25% of the unpaid amount of the tax. *See* Ga. Code Ann. § 48-7-2 (criminal prosecution); Ga. Code Ann. § 48-7-81(a) and § 48-2-40 (interest); Ga. Code Ann. § 48-7-86(a) (penalties). Such retired taxpayers would have also risked the garnishment of their wages, levies upon their property, and judicial sales of their property, for the amount of unpaid taxes, interest and penalties. *See* Ga. Code Ann. § 48-2-55(b)(2) (garnishment); Ga. Stat. Ann. § 48-2-55(c) and (d) (levies, execution and judicial sales). Surely, the Due Process Clause does not require federal retirees to assume the risk of such potentially serious consequences for nonpayment before final resolution of their constitutional challenge to the validity of the Georgia income tax on federal retirement benefits. *See, e.g., McKesson*, 496 U.S. at 38 n. 21; *Hagge*, 504 N.W.2d



at 450-451; *Service Oil*, 479 N.W.2d at 821-824.<sup>4</sup>

For retired taxpayers living on fixed incomes in Georgia, there can be no doubt that such potential consequences created implied duress and that their tax payments "must be treated as an effort 'to avoid financial sanctions or a seizure of real or personal property.'" *Harper*, 113 S.Ct. at 2519 n. 10 (quoting *McKesson*, 496 U.S. at 38 n. 21). The Georgia Supreme Court's complete failure to recognize or attach any significance to these serious potential consequences for nonpayment is, therefore, wholly inconsistent with the requirements of due process reiterated by this Court in *Harper* and *McKesson*. Under the circumstances, Georgia has shunned its solemn constitutional obligation to afford federal retirees any fair, meaningful, clear or certain postpayment remedy to redress unlawful state taxation. Accordingly, review by this Court on writ of certiorari is necessary to enforce controlling principles of federal due process which have thus far been ignored

<sup>4</sup> Writing for a unanimous court in *O'Connor*, Justice Holmes recognized that a taxpayer "should be at liberty to avoid those disadvantages by paying promptly and bringing suit" and "is entitled to assert his supposed right on reasonably equal terms." 223 U.S. at 286. Where a State, such as Georgia, obtains a lopsided advantage against taxpayers by employing significant financial sanctions and summary remedies to secure prompt payment of disputed taxes before any challenge is made or resolved, principles of justice and fair play embodied in the Due Process Clause of the Fourteenth Amendment entitle taxpayers to level the playing field, and avoid duress, by paying such taxes prior to and during the pendency of any challenge to their validity. *Id.* at 286-287.

In *McKesson*, the taxpayer sought postdeprivation relief from unlawful excise taxes paid during a 32-month period before and after the commencement of suit in Florida state court. 497 U.S. at 23-25 and n.4. Since potential financial sanctions and summary remedies negated any fair or meaningful predeprivation procedure in *McKesson*, the taxpayer there was entitled "to assert [its] right on reasonably equal terms," *O'Connor*, 223 U.S. at 286, by paying the tax and seeking meaningful postdeprivation relief. See *McKesson*, 496 U.S. at 22, 32-33, 37-39 and 51-52. These same principles of justice and fair play are equally applicable here.

by the Supreme Court of Georgia.<sup>5</sup>

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of the State of Georgia should be granted and the decision below reversed.

Respectfully submitted,

John C. Frieden  
Kevin M. Fowler\*  
FREIDEN, HAYNES & FORBES  
400 S.W. 8th, Suite 409  
Topeka, KS 66603  
(913) 232-7266

\*Counsel of Record for  
*Amici Curiae*

Kenton C. Granger  
Raymond L. Dahlberg  
NIEWALD, WALDECK &  
BROWN, P.C.  
9401 Indian Creek Pkwy  
Corporate Woods, Bldg. 40  
Suite 550  
Overland Park, KS 66225  
(913) 451-1717

<sup>5</sup> The Georgia Supreme Court's suggestion that federal retirees could have fully litigated "the validity of taxes alleged owing prior to the time when the taxes fall due" (Pet. App. A at 4A) does not withstand casual scrutiny. Georgia income taxes are generally due on or before April 15 following the close of each calendar year. See Ga. Code Ann. § 48-7-80 (1982 & Supp. 1993). In the interim, however, taxpayers are also required to make estimated income tax payments in four equal quarterly installments, Ga. Code Ann. § 48-7-116(a) (1982 & Supp. 1993), and the failure to make such payments in a timely manner subjects the taxpayer to the assessment of 9% interest per annum on the amount of any underpayments, Ga. Code Ann. § 48-7-120(a) (1982). Given the protracted period of years during which *Davis*-related litigation has been pending in Georgia and elsewhere, as a matter of historical fact, federal retirees have not and could not have fully litigated or resolved the validity of Georgia's income tax on their federal retirement benefits before the tax became due. Moreover, any federal retiree who withheld payment of such challenged taxes since 1989 would have been subject to a staggering assessment of interest and penalties, as well as the potential garnishment of wages, levies upon property and judicial sales of their property, for unpaid taxes, interest, penalties and costs of execution.

Roger M. Theis  
9411 Shannon Way Court  
Wichita, KS 67206  
(316) 634-0418

Robert J. Costello  
PHELAN & COSTELLO, P.C.  
One Penn Plaza, Suite 4310  
New York, NY 10119  
(212) 868-3000

Terence A. Lober  
1117 Cherokee Street  
Leavenworth, KS 66048  
(913) 682-3822

Kevin "D" Watley  
224 West Gray Street  
Norman, OK 73069  
(405) 321-5858

*Counsel for Amici Curiae*

## APPENDIX A

The following is a complete list of all individuals appearing as *amicus curiae* in connection with this brief:

### KANSAS AMICI

The petitioners in *Barker v. Kansas*, 112 S.Ct. 1619 (1992), *on remand*, Nos. 89-CV-666 and 89-CV-1100 (Dist. Ct. Shawnee Cty., Kan., Div. IV), include:

KEYTON BARKER;	MARJORIE E. LOBER;
ROBERT W. CLAY;	ROGER J. OLSON;
BETTY J. CLAY;	NANCY W. OLSON;
ANTHONY E. CORCORAN;	ANDREW J. PEELE;
LELAND W. KEISTER, JR.;	JOHN G. FOWLER;
WILLIAM RICHARDS SR.;	OLLUN E. RICHARDS;
PATRICIA K. KEISTER;	LONETA S. WILLIAMS;
LEONARD W. WILLIAMS;	EDWARD F. KELLOGG;
RENATA O. KELLOGG;	CLARENCE WOLF; AND
WILLIAM J. LOBER, JR.;	FLORA B. WOLF,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 14,000 federal military retirees (and joint taxpayer spouses where applicable) who were subject to Kansas income taxation of federal military retired pay during one or more years from 1984 through 1991.

**NEW YORK AMICI**

The appellants in *Duffy v. Wetzler*, 555 N.Y.S.2d 543 (N.Y. Sup. Ct. 1990), *aff'd as modified*, 174 A.D.2d 253, 579 N.Y.S.2d (N.Y. App. Div.), *appeal dism'd*, 79 N.Y.2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (N.Y. 1992), *cert. granted, vacated, and remanded*, 113 S.Ct. 3027 (1993), *on remand*, Nos. 90-07800 and 91-02056 (N.Y. Sup. Ct.), include:

EUGENE H. DUFFY;	DANIEL J. MAHER;
ALICE G. DUFFY;	MARGARET A. MAHER;
ETTORE DELZIO;	FERNANDO S. MAURA;
VIVIAN DELZIO;	THOMAS F. MOLLOY;
ALBERT ENGEL;	JUDITH ENGEL;
JOSEPH A. O'SULLIVAN;	RITA M. O'SULLIVAN;
STANLEY L. GOLDSTEIN;	JAMES SWEEZY;
MILDRED GOLDSTEIN;	ALICE SWEEZY;
HARVEY GOTTLIEB;	IRVING WAX; AND
PETER M. KALEY;	HELEN WAX.
MARY T. KALEY;	

**OKLAHOMA AMICI**

The appellants in *Strelecki v. Oklahoma Tax Comm'n*, \_\_\_ P.2d \_\_\_ (Okla., Sept. 28, 1993) (No. 77,615), *pet. for rehearing filed* (Oct. 18, 1993), include:

JOSEPH L. STRELECKI;  
 JUNE C. LANKFORD;  
 LEETA LANKFORD;  
 JAMES O. WORRELL;  
 NEAL W. HARRIS; AND  
 ELIZABETH B. HARRIS.



8  
No. 93-908

Supreme Court, U.S.

FILED

APR 15 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the  
Supreme Court of Georgia

JOINT APPENDIX

CARLTON M. HENSON  
MCALPIN & HENSON  
Eleven Piedmont Center  
Suite 400  
3495 Piedmont Road  
Atlanta, GA 30305  
(404) 239-0774  
*Counsel of Record  
for Petitioner*

WARREN R. CALVERT  
Senior Assistant Attorney General  
MICHAEL J. BOWERS  
Attorney General  
DANIEL M. FORMBY  
Senior Assistant Attorney General  
Georgia Department of Law  
132 State Judicial Bldg.  
Atlanta, GA 30334  
(404) 656-3370  
*Counsel of Record  
for Respondents*

PETITION FOR CERTIORARI FILED DECEMBER 8, 1993  
CERTIORARI GRANTED FEBRUARY 22, 1994

50 PP 1  
8/10

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CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES

- April 19, 1990—Complaint For Refund Of Taxes Illegally Collected filed in the Superior Court of Clayton County, State of Georgia
- May 21, 1990—Answer filed in the Superior Court of Clayton County, State of Georgia
- December 10, 1991—Order issued by the Superior Court of Clayton County, State of Georgia, Judge Kenneth Kilpatrick
- January 9, 1992—Application for Discretionary Appeal filed by Plaintiff with Georgia Supreme Court
- January 31, 1992—Order from Georgia Supreme Court granting application for discretionary appeal
- February 3, 1992—Notice of Appeal to Georgia Supreme Court filed by Plaintiff in the Superior Court of Clayton County, State of Georgia
- November 19, 1992—Decision issued by the Georgia Supreme Court affirming in part and reversing in part
- November 30, 1992—Motion for reconsideration of appellant filed in Georgia Supreme Court
- December 17, 1992—Order by Georgia Supreme Court denying motion for reconsideration
- January 29, 1993—Petition for Certiorari filed
- June 28, 1993—Petition for Certiorari granted, judgment of the Georgia Supreme Court vacated, and case remanded for further consideration in light of *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993)
- December 2, 1993—Decision issued by the Georgia Supreme Court on remand
- December 8, 1993—Petition for Certiorari filed
- February 22, 1994—Petition for Certiorari granted



[Atlanta Journal and Constitution, 5-C, April 8, 1989]

[Deposition of H. Thomassen, Ex. 2]

## HARRIS REJECTS CALL TO SUSPEND TAXING OF FEDERAL RETIREES

Ga. Not in Line with U.S. High Court

Gov. Joe Frank Harris rejected a recommendation Friday that he invoke an 1821 law to suspend taxation of federal retiree benefits until the Legislature returns next year to bring Georgia in compliance with a recent U.S. Supreme Court ruling.

State Rep. Denmark Groover, Jr. (D-Macon) suggested the governor take action to avoid potential lawsuits.

Georgia law exempts state retirees from paying income taxes on their pensions, but federal retirees are taxed on a total of about \$1.2 billion in pension benefits.

"These [federal] retirees are real upset about it, and they feel like nobody is taking any action on it," Mr. Groover said. "The only thing then would be for someone to pop up and file a lawsuit on it."

The Supreme Court ruled last week that it is illegal for a state to tax the benefits of those with federal government pensions while not taxing the benefits of state government retirees. Barring any further ruling, Georgia either would have to stop taxing the federal retiree benefits or start taxing those of state retirees.

"I do not plan to take such action," Mr. Harris said Friday, adding only that the issue would have to be decided through further "judicial decisions."

Don Steele, director of the state Revenue Department's Income Tax Division, said the department has been bombarded with calls from federal civil service and military retirees about how to qualify for possible refunds on state income taxes they paid on their pensions in 1985. There is a three-year statute of limitations on refunds.

"It has created a great deal of interest, there's no doubt about that," Mr. Steele said.

State Revenue Commissioner Marcus Collins has said he will make no change in Georgia tax collections until a lawsuit forces a change or the General Assembly gives him new tax laws.

State Attorney General Michael J. Bowers said Mr. Collins' position was taken with advice from his office. "We've got a legal dilemma," Mr. Bowers said. "It's virtually certain that this Michigan holding [by the U.S. Supreme Court] applies. The question is what we do about it. You cannot change a tax law without a lawsuit or action by the General Assembly."

The governor of Virginia, one of 15 states affected by the Supreme Court ruling, has called a special legislative session to decide how to cope. That state will suffer a \$150 million-a-year loss if it starts exempting federal retiree pensions, a spokesman in the governor's office said Friday.

"I don't think it's urgent enough to call a special session of the [Georgia] Legislature," Mr. Steele said, "but it's urgent enough that it will have to be addressed by the next regular legislative session."

He said it's possible the state could tax retired state employees, acknowledging that such a move could be a political bombshell, especially with 1990 being an election year.

"But the court ruling," he said, "is very clear. You can't discriminate. What you do for one, you do for the other. We either stop taxing the federal retirees, or we tax the state retirees. The other big question is whether any decision will be retroactive."

The 168-year-old Georgia statute cited by Mr. Groover gives the governor power to "suspend the collection of taxes, or any part thereof, due the state, until the meeting of the next General Assembly."

"I called the governor's office and suggested he suspend collection of that tax [on federal pensions]," Mr. Groover said. "That would at least suspend the problem until the next session of the General Assembly, and then they could address it as they wanted to."

He said that the state probably would have to refund such taxes with interest and added that action now would give those retirees some relief.

"These folks are generally on fixed incomes, and they need what little is not taxed more than the state needs it," he said.

Mr. Groover said he had seen estimates that the revenue loss to the state would be \$40 million a year if it ended the taxation of federal benefits. "And that ain't nothing in the state's budget," he said, "but \$10 a month to a retiree is \$10 a month."

#### Take Refund Steps, Pensioners Advised

If the Georgia Legislature votes next session to refund taxes collected from federal pensions, some 100,000 retired federal employees should take steps now to qualify to receive any refunds that might result.

Don Steele, director of the Georgia Revenue Department's Income Tax Division, recommends the pensioners file state income tax Form 500-X by April 17. There is a two-day grace period between filing the form and the tax deadline because the April 15 deadline falls on a Saturday this year.

The 500-X tax forms can be obtained at 10 different Revenue Department regional offices around the state: the Atlanta office at the Trinity-Washington Building in the state Capitol complex, Albany, Athens, Augusta, Columbus, Douglas, Macon, Rome, Savannah and Tucker.

## IN THE SUPERIOR COURT OF CLAYTON COUNTY STATE OF GEORGIA

Civil Action File No. 89-CV-13238-4

THREE RETIRED SOLDIERS a/k/a AVERY T. SALTER, JR.,  
CHARLES J. REICH, and ROBERT L. NEAL,  
*Petitioners,*

v.

THE STATE OF GEORGIA and  
GOVERNOR JOE FRANK HARRIS and  
STATE REVENUE COMMISSIONER  
MARCUS E. COLLINS, SR.,  
*Respondents.*

[April 14, 1989]

### PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW Petitioners above and show this Court as follows:

1.

Each of the Petitioners resides in Clayton County, Georgia; thus, pursuant to O.C.G.A. §§ 9-4-5, 48-2-35 (b)(4) and 50-13-10; this Court has jurisdiction and venue of this matter.

2.

Respondents can be served by second originals of this Petition as follows:

a. The State of Georgia, c/o State Attorney General MITCHELL J. BOWERS, 132 Judicial Building, Atlanta, GA 30334.



b. Governor JOE FRANK HARRIS, State Capitol Building, Atlanta, GA 30334.

c. State Revenue Commissioner MARCUS E. COLLINS, SR., State Department of Revenue, 270 Washington Street, S.W., Room 410, Atlanta, GA 30314.

### 3.

An actual controversy exists in this case between the parties for the specific reasons enumerated below:

a. The State of Georgia has illegally discriminated against Petitioners (and other retired federal military and civilians residing in the State of Georgia) by assessing income tax at the rate of six (6%) percent of their retired pensions while at the same time and by the same tax code (specifically O.C.G.A. § 48-7-27); exempting State of Georgia retirees from such income tax since 1980. This matter was decided, conclusively and adversely to the State of Georgia, by the United States Supreme Court in its decision in the case of *Davis v. Michigan Department of Treasury*, U.S. — (March 28, 1989).

b. Notwithstanding the *Davis* decision: O.C.G.A. § 48-2-35(b)(1) limits tax refunds applications to only three years—in specific derogation of the holding in *Davis* finding against the Michigan Department of Treasury wherein tax refunds were found to be due Mr. Davis from the period 1979 through 1984. The only exception to Georgia's three year statute of limitations is for service in the Armed Forces which shall "date for three years from discharge." The effect in the instant case is for the State of Georgia to impermissibly insulate itself for prior years (i.e., prior to the three year statute) from payment of tax refunds; *despite* the fact that Petitioners were required during such time (and even to the present) *by state law* to pay such illegal taxes or else risk tax penalties, interest and possibly even criminal jeopardy in the

event they had refused to pay same. The above-named Petitioners have tax refunds due them for years prior to tax year 1985 as well as for 1985 and for tax years thereafter.

c. O.C.G.A. § 48-2-55 permits the State to levy and garnish delinquent taxpayers' assets and O.C.G.A. § 48-2-56 permits the State to lien the taxpayers' property, while O.C.G.A. § 48-2-35 specifically *prevents* the taxpayers from *even commencing* a lawsuit to attempt to recover tax refunds until the *expiration of one year* (emphasis supplied) from the filing of such a claim. Yet there is no corresponding provision to permit the taxpayers, who are due refunds as a result of the illegal tax assessment by Respondents, to either levy, garnish, or lien the State's assets.

d. O.C.G.A. § 48-2-35(a) permits only a *nine (9%)* percent per annum interest rate as to *tax refunds* (although the Form 500X, at Line 13, apparently speaks to a twelve (12%) percent interest rate whether for a refund or a penalty of both; beginning July 1, 1980). However O.C.G.A. § 48-2-40 provides that taxes owed the State by delinquent taxpayers shall be paid at the rate of 1% per month from the date the tax is due.

e. Foregoing provisions of the tax codes have resulted in a failure of Federal and State of Georgia constitutional protection of "due process" and "equal protection" as to the Petitioners (and all such other affected state citizens) and thus should be declared unconstitutional by this Court.

### 4.

This controversy is a "justiceable" controversy, as contemplated by O.C.G.A. § 9-4-2, in that the Petitioners are asserting an adverse claim against Respondents who, *NOTWITHSTANDING* the decision in *Davis*; and despite their apparent awareness of same; have apparently clearly and in a deliberate and confrontational matter have stated their intentions—even publicly to the press—



wherein they claim they will refuse to adhere to the *Davis* decision short of judicial and or legislative actions (see attached copy of 4/8/89 article in the Atlanta Journal and Constitution and elements thereof as highlighted.)

## 5.

By their actions and statements, and their failure to change policy without judicial and/or legislative actions Respondents apparently intend to continue requiring illegal income tax payments and to continue assessing penalties and interest against Petitioners and all other such affected taxpayers; notwithstanding the U.S. Supreme Court decision in *Davis*. Respondents appear to have *no intention* of changing any tax laws, nor procedures for assessment or collection of taxes at this time; thus putting Petitioners (and all other such affected State citizens) not only in civil jeopardy but also possibly subjecting Petitioners (and all other such affected State citizens) to follow-on criminal jeopardy as well.

## 6.

Plaintiffs have incurred, and can reasonably expect to incur further legal expenses by being forced to file this action for their protection from the apparently arbitrary and unyielding decisions taken by Respondents in this matter.

WHEREFORE Plaintiffs pray that this Court:

- a. Review this action and set a date for an appropriate Rule Nisi Hearing and trial on its merits; and
- b. Declare the provisions of O.C.G.A. § 48-2 *et seq.* unconstitutional to the extent that such code limits tax refund claims to three years and proscribes interest rates and penalties at unequal rates as between taxpayers and the State; and
- c. Declare the provisions of O.C.G.A. §§ 48-2-55 and 48-2-56 unconstitutional insofar as it discriminates against

the taxpayer by not permitting the taxpayer the same options as the State has with respect to levy, garnishment and liens; and currently authorized to the State against delinquent taxpayers; and

d. For immediate injunctive relief, prohibiting now, and in the future, the State of Georgia from continuing to assess illegal taxes against Federal retirees pensions for 1988 as well as for tax years prior thereto and for tax years thereafter; and

e. For the costs of filing this action and all reasonable attorney's fees and other costs of litigation due to Defendants actions by their requiring that this matter be taken to Court rather than by being settled by submission of Tax Form 500X (already in existence) or by other reasonable statements and proofs of claim to be submitted by the affected taxpayers; and

f. For such other relief as this Court may deem just and proper.

Respectfully submitted,

/s/ Avery T. Salter, Jr.  
 AVERY T. SALTER, JR.  
 Georgia State Bar #622950  
 Attorney at Law, Pro-Se for himself;  
 and as Attorney for Petitioners  
 CHARLES J. REICH and  
 ROBERT L. NEAL above

Crews, Salter & Gisler, P.C.  
 P.O. Box 951  
 Jonesboro, GA 30237  
 (404) 478-2511

The Bureau of Investigation has conducted extensive  
upgrading of the Bureau's files and has  
and has been very successful in the past few years  
because of the Bureau's efforts to improve its

4. For information purposes, the Bureau has  
and in the future, the Bureau is planning  
to make these files available to the public  
for 1955 or earlier in the year 1955 and for future  
years.

5. For the purpose of this report, the Bureau has  
attorney's fees and other costs of the Bureau  
and has been very successful in the past few years  
because of the Bureau's efforts to improve its  
files.

6. For each year, the Bureau has been very  
and has been very successful in the past few years  
because of the Bureau's efforts to improve its

Respectfully submitted,

to the Bureau of Investigation, the Bureau has  
and has been very successful in the past few years  
because of the Bureau's efforts to improve its  
files.

7. For the purpose of this report, the Bureau has  
attorney's fees and other costs of the Bureau  
and has been very successful in the past few years  
because of the Bureau's efforts to improve its

8. For each year, the Bureau has been very  
and has been very successful in the past few years  
because of the Bureau's efforts to improve its  
files.

9. For the purpose of this report, the Bureau has  
attorney's fees and other costs of the Bureau  
and has been very successful in the past few years  
because of the Bureau's efforts to improve its



IT-27 (Rev 08/88)  
GEORGIA  
DEPT. OF REVENUE  
INCOME TAX DIVISION  
P.O. BOX 38395  
ATLANTA, GA. 30334  
PHONE (404) 651-9030

1. PER RETURN 2. OUR COMPUTATION

Federal adjusted  
Gross Income (line 8)

68,838.00 \*

REFER TO-225 46 2871 OA 46376

Adjustments

0.00 \*

0.00

AREN 259 88 1513 OP 4300388

Georgia adjusted gross

68,838.00

68,838.00

TAX YEAR 1988 DATE 05/16/89 FB03 2

Deductions

5,537.00 \*

5,537.00

\* OR FROM RETURN AS CORRECTED

Exemptions

4,500.00

4,500.00

Net taxable income

58,801.00

58,801.00

Total tax

3,268.00

3,268.00

Less: Low income credit

0.00

0.00

Other credit

0.00 \*

0.00

Balance

3,268.00

3,268.00

Less: Tax withheld

1,357.00 \*

1,357.00

Estimate paid

1,500.00 \*

1,500.00

Other prepay

0.00

0.00

Paid with return

0.00

0.00

Balance

411.00

411.00

Penalty (see code)

2

2.08

Interest

4.11

REICH, CHARLES J & SHIRLEY S  
1108 E FAYETTEVILLE RD

RIVERDALE GA 30298

Credit to estimated tax

0.00

Refund-authorized

0.00

(OR)

AMOUNT NOW DUE

417.17

◀ An amount shown on this line is  
being processed for refund to you.

◀ The Georgia Income Tax Law does not  
provide for installment payments of the  
amount on this line.

PENALTY CODE: 1. Delinquent filing 2. Late payment 3. Underestimate

SEQ NO.: 506



[REDACTED]

CM NO. 46376

REICH, CHARLES J & SHIRLEY S  
1100 E PAYETTEVILLE RD

**RIVERDALE - GA 30286**

**PAYMENT DUE IMMEDIATELY  
COPY WITH YOUR PAYMENT**

**PAYMENT DUE IMMEDIATELY**  
**SUBMIT THIS COPY WITH YOUR PAYMENT OR INQUIRY**  
**ICES ON THE REVERSE SIDE OF THIS FORM AND MAIL TO THE ABOVE**  
**OR RETURN OR ASKED YOUR RETURN IS RESPONSE TO THIS NOTICE.**

1

JUNE 15, 1969

Case No. \_\_\_\_\_

This notice is returned without action based upon following:

MY LETTER TO MR JERRY A. BOARDS, THE COMPTROLLER, DEPT OF REVENUE, DATED 3-30-69 AND HAVE DELETED SAME DATE SUB: SUBMISSION OF '68 GEORGIA FORM 500 (EXPENSES AND DEMAND FOR REPAIR OF OVERHAUL STATE TAXES.

my clarified mail # P 978 165 721 to same addressee dated 4-12-89, regarding  
for 4-14-89, Subj: Filing of Form 500X for the years 1985 thru 1988 with  
nine (9) enclosures attached thereto

3) Civil Action File no 89-cv-13238-4, Supreme Court, Clayton Co. GA Filed 4-14-89  
THREE Retired Soldiers et al vs STATE Revenue Commissioner MAURICE COLLINS JR.  
ET AL. "Petition for Declaratory Judgment and Injunctive Relief."

Charles Lewis

CHARLES J. REICH 225-46-2871

## IN THE SUPREME COURT OF GEORGIA

---

Case No. 47018

MARCUS COLLINS, INDIVIDUALLY AND IN HIS CAPACITY  
AS GEORGIA STATE REVENUE COMMISSIONER, AND THE  
GEORGIA DEPARTMENT OF REVENUE,  
v. *Appellants,*

JAMES E. WALDRON, JACK HOBBS, WALTER CYBART,  
AND ALL RETIRED FEDERAL EMPLOYEES  
SIMILARLY SITUATED,  
*Appellees.*

---

[May 24, 1989]

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BRIEF OF APPELLANTS

---

## I. STATEMENT OF JURISDICTION

The Supreme Court of Georgia has jurisdiction of this appeal for the reason that this case, in which the constitutionality of a law has been drawn in question, is one in which exclusive jurisdiction is vested in the Supreme Court by Article VI, Section VI, Paragraph II of the 1983 Georgia Constitution. Moreover, the appealed order is one granting interlocutory injunctive relief; consequently, this is an "equity case" within the Supreme Court's jurisdiction by virtue of Article VI, Section VI, Paragraph III of the 1983 Georgia Constitution. Finally, this case concerns state income taxes and is therefore one involving "state revenue" within the meaning of *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977); hence, the Court of Appeals would be required to transfer this case



to the Supreme Court even if appellate jurisdiction otherwise lay in the Court of Appeals.

## II. STATEMENT OF FACTS

On March 28, 1989, the United States Supreme Court ruled in *Davis v. Michigan Department of the Treasury*, 57 U.S.L.W. 4389 (U.S. March 28, 1989), that income tax statutes of the State of Michigan—which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and is political subdivisions—violated federal law. On April 10, 1989, James E. Waldron, Jack Hobbs, and Walter Cybart, on behalf of themselves and all similarly situated retired federal employees, filed suit in Richmond County Superior Court, contending that Georgia's income tax scheme failed the *Davis* test, and moving for an interlocutory injunction in the form of "an order requiring defendants to place in escrow all state income taxes, quarterly estimates, or withholdings which [defendants] receive on the retirement or pension benefits of former federal employees." (R. 4 through 11, and 12.) The superior court heard the plaintiffs' motion on Thursday, April 13, and on April 14 the court ordered the escrow sought by them. (R. 33 through 37.) On Monday, April 17, the defendants (referred to collectively as "the State") filed with this Court an emergency motion for supersedeas pending appeal. The Court granted the State's motion on Wednesday, April 19. (R. 41.)

## III. ENUMERATION OF ERRORS

The State respectfully submits that the Honorable William M. Fleming, Jr., Judge, Richmond County Superior Court, erred in granting an interlocutory injunction in the form of "an escrow fund [of] all state income taxes collected from [April 14, 1989] on the federal retirement income of former federal employees in Georgia and quarterly payments or withholdings on the same," pending a decision on the legality of the State's income taxation of federal retirement benefits. (R. 36.)

## IV. ARGUMENT AND CITATION OF AUTHORITIES

"The universal test of the jurisdiction of a court of equity to issue injunctions is the absence of a legal remedy by which the complainant might obtain the full relief to which the facts and circumstances entitle him. . . ." *Chadwick v. Dolinoff*, 207 Ga. 702, 703, 64 S.E.2d 76, 77 (1951). "Equity will grant relief only where there is no available adequate and complete remedy at law." *Stewart v. Walton*, 254 Ga. 81, 82, 326 S.E.2d 738, 739 (1985). "[I]t is error for the court to grant an interlocutory injunction in a case where the plaintiff has an adequate remedy at law." *Thomas v. Mayor of Savannah*, 209 Ga. 866, 867, 76 S.E.2d 796, 797 (1953). See also O.C.G.A. §§ 9-5-1, 23-1-4.

Under these well-established principles, the superior court erred in granting an interlocutory injunction in the form of "an escrow fund [of] all state income taxes collected from this date on the federal retirement income or former federal employees in Georgia, and quarterly payments or withholdings on the same . . . ." (R. 36.) Code Section 48-2-35 provides a procedure for the refund of taxes erroneously or illegally assessed or collected; this is clearly an adequate remedy at law, within the meaning of the authorities cited above, so as to preclude the equitable relief ordered by the superior court. See *Helms Bakeries v. State Bd. of Equalization*, 53 Cal. App.2d 417, 421, 128 P.2d 167, 171 (1942) (action under California's Retail Sales Tax Act for the recovery of taxes paid but not due was an "adequate remedy at law," barring injunctive relief); *Oklahoma Tax Comm'n v. Harris*, 191 Okla. 28, 126 P.2d 685 (1942) (taxpayer could not enjoin collection of additional income taxes, in view of "adequate remedy at law" available under statutory refund procedure). See generally *Mize v. Bank of Whigham*, 137 Ga. 798, 799, 74 S.E. 533, 534 (1912) (trial



court erred in requiring an escrow of disputed funds, where there was no evidence that the defendant would be financially unable to pay such judgment as might later be rendered).

At the April 13 hearing, the superior court expressed the following reservations concerning the adequacy of the statutory refund mechanism:

How can the refund be an adequate remedy at law? . . . [Y]ou say there is an adequate remedy at law because you can file a lawsuit; you can go and get . . . a lawyer, or you can go hire . . . an accountant, and you can pay him, but when you get your refund . . . you're not going to be entitled to get any attorney's fees, and you're not going to be able to get any accountant fees. How do you make that person whole?

(Tr. 47.)

But [taxpayers] can't be made whole because they have to hire someone, if they're not intelligent enough to know how to fill out all . . . those forms . . .

(Tr. 48.)

They can't be made whole . . . There is no way they can be made whole if they have to go through all of the trouble and the time of amending a tax return.

(Tr. 50.)

The State respectfully submits that the focus of the superior court—that an individual wishing to use the statutory refund procedure might require professional assistance, and that such costs are not recoverable under the statute—is irrelevant to whether O.C.G.A. § 48-2-35 is an “adequate remedy at law.” There are always costs and expenses incident to pursuing a legal remedy. Moreover, “[e]xpenses of litigation, including attorney fees,

generally are not allowed . . . in the absence of statutory provision therefor.” *Strickland v. Williams*, 234 Ga. 752, 754, 218 S.E.2d 8, 10 (1975). *Accord In Re Olliff*, 184 Ga. App. 846, 847, 363 S.E.2d 158, 159 (1987). If the test of an “adequate remedy at law” were that articulated by the court below, then virtually no remedy would qualify, and equitable relief would be the norm rather than the exception. In fact, this Court has ruled that a legal remedy can be “adequate,” so as to preclude injunctive relief, even where the particular plaintiff is financially unable to pursue the remedy at all. *Morrison v. Roberts*, 195 Ga. 45, 47, 23 S.E.2d 164, 166 (1942) (that individual, who wished to contest dispossessory proceedings for non-payment of rent, was unable to post bond required under statute providing such a remedy, did not justify enjoining the dispossessory). That reasoning should be of equal force here.

The superior court's order itself implicitly recognizes the adequacy of the statutory refund procedure, since it offers the State the option of making a deposit into escrow based on “a good faith estimate of the amount of state income taxes collected from this date on the federal retirement income of Georgia residents.” (R. 36.) The refund procedure of O.C.G.A. § 48-2-35 is the equal of this option, with the only difference being the fund from which refunds might later be claimed, i.e., the general treasury, see O.C.G.A. § 48-2-35(a), or the court-ordered escrow. Individual taxpayers would still have to make claims against the escrow and establish their right to some portion; doing so would entail the same time, “trouble”, and unreimbursable expenses as pursuing refund claims under O.C.G.A. § 48-2-35.

For the reasons above, the superior court was absolutely prohibited from ordering an escrow fund. Even if the lower court had the discretion to grant interlocutory injunctive relief under these facts, however, doing so was an abuse of that discretion. An interlocutory injunction should be refused where it “would operate oppressively on



the [defendant], especially [where] the denial of the . . . injunction would not work 'irreparable injury' to the plaintiff or leave the plaintiff 'practically remediless' in the event [it] 'should thereafter establish the truth of [its] contention.'" *MARTA v. Wallace*, 243 Ga. 491, 495, 254 S.E.2d 822, 824 (1979), quoting from *McKinnon v. Neugent*, 226 Ga. 331, 174 S.E.2d 788 (1970). The Georgia income tax scheme which the plaintiffs challenge has existed for many years; this fact, coupled with the refund mechanism set out in O.C.G.A. § 48-2-35, clearly showed that the plaintiffs faced no prejudice or harm if the Revenue Department were permitted to collect the disputed taxes in the normal fashion, instead of collecting and holding such funds in an escrow, pending a decision on the plaintiffs' constitutional challenge.

By contrast, the lower court's escrow order threatened the State with immediate and severe harm. As of April 12, there were in excess of 1,000,000 personal income tax returns yet to be filed for the tax year 1988. (Tr. 81.) To isolate those returns which included federal civil service or military retirement benefits, to manually recalculate each such return remitting additional income tax to determine what portion of the remittance was attributable to federal retirement benefits, and to establish and administer a special fund for the disputed taxes to be set aside, would have required the Revenue Department to completely reallocate its resources, during the height of the filing and processing season. (Tr. 81 through 83.) Moreover, since Georgia individual estimated tax returns provide no information at all concerning the sources of income or deductions used to make the estimate, it would have been impossible to determine from the estimated tax returns themselves even if federal civil service or military benefits had been included in the estimated tax calculations. (Tr. 83 and 84.) When equitable relief is sought, the equities as between the parties should be balanced, and the balance in this case clearly weighed in favor of

the State and against the relief ordered by the superior court.

The taxpayers' prayer for injunctive relief, and the superior court's escrow order, rely almost exclusively on the decision in *Georgia v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988). That case, however, involved a situation wholly unlike that here. *Private Truck Council* concerned a declaratory judgment action brought prior to the effective date of State Regulation 560-9-2-13, which had been promulgated to implement 1984 amendments to Georgia's highway use tax statutes, see O.C.G.A. §§ 40-2-111 and 40-2-112, and which greatly increased amounts previously paid by the affected taxpayers in that case. (Tr. 63, 66 and 67.) The Fulton County Superior Court established an escrow of the disputed taxes "[i]n order to preserve the status quo . . . ." (Tr. 77.) Here, the challenged tax scheme has been in place for many years; maintaining the status quo would be to allow the State to continue administering the income tax statutes as they have long existed, leaving taxpayers to their refund remedy under O.C.G.A. § 48-2-35 if it is eventually determined that the disputed taxes were "erroneously or illegally assessed and collected."

In addition, *Private Truck Council* dealt with taxes which, if unconstitutional, were invalid as to all those paying and as to all amounts paid. Here, federal retirees constitute only a percentage of the total number of persons filing income tax returns, the returns of such federal retirees are not normally singled out for special handling or processing, and only a portion of any retiree's remittance might be attributable to the inclusion of disputed federal retirement benefits. In short, the escrow in *Private Truck Council* presented none of the administrative difficulties that make the superior court's escrow order in this case most objectionable.

Finally, *Private Truck Council* concerned a Commerce Clause challenge to "taxes on vehicles registered in certain

states which are not imposed on vehicles registered in . . . Georgia." 258 Ga. at 532-33, 371 S.E.2d at 380. "One of the fundamental purposes of the Clause 'was to insure . . . against discriminating State legislation,'" *Bacchus Imports v. Dias*, 468 U.S. 263, 271 (1984), quoting from *Welton v. Missouri*, 91 U.S. 275, 280 (1876), which impose "a disadvantage upon nonresidents," *Austin v. New Hampshire*, 420 U.S. 656, 667 n. 12 (1975). Since *Private Truck Council* involved non-residents, a group without a direct political voice in the state, it may have been appropriate to assign greater weight to the equities favoring a court-ordered escrow, or to apply a more exacting standard for deciding whether an "adequate" legal remedy existed. Cf. Case Comment, *Racial Discrimination and the Tax Injunction Act: Garrett v. Bamford*, 90 Harv. L. Rev. 616, 623 (1977) ("[A]n allegation of discriminatory tax treatment on the basis of race . . . would justify heightened scrutiny in order to insure that state procedures and remedies can adequately protect plaintiffs' rights.") Such circumstances are not present here.

## CONCLUSION

Because O.C.G.A. § 48-2-35 provides a procedure for the refund of taxes erroneously or illegally assessed and collected, the taxpayers had an adequate remedy at law precluding the equitable relief ordered by the superior court. Even if the superior court had the discretion to grant interlocutory injunctive relief under these facts, however, doing so was an abuse of that discretion. Moreover, the decision in *Private Truck Council* should be limited to its particular facts, which are wholly unlike those in the present case. For these reasons, the superior court erred in ordering the escrow fund and should be reversed.

Respectfully submitted,

MICHAEL J. BOWERS  
Attorney General

H. PERRY MICHAEL  
Executive Assistant Attorney General

/s/ Harrison Kohler  
HARRISON KOHLER  
Deputy Attorney General

/s/ Verley J. Spivey  
VERLEY J. SPIVEY  
Senior Assistant Attorney General

/s/ Warren R. Calvert  
WARREN R. CALVERT  
Assistant Attorney General

132 State Judicial Building  
Atlanta, Georgia 30334  
Telephone: (404) 656-3340





IT-57 (Rev 12/87)  
GEORGIA DEPT. OF REVENUE  
INCOME TAX DIVISION  
P.O. BOX 38395  
ATLANTA, GA. 30334  
Phone: (404) 651-9030

**OFFICIAL NOTICE OF ASSESSMENT AND DEMAND FOR PAYMENT**

DEMAND IS MADE FOR THE IMMEDIATE PAYMENT OF THE TOTAL AMOUNT DUE AS SHOWN IN THIS ASSESSMENT. THIS ASSESSMENT BECOMES FINAL IN THIRTY (30) DAYS FROM THE DATE BELOW AND COLLECTION PROCEEDINGS WILL BEGIN AS PROVIDED BY GEORGIA LAW. BASED ON NOTICE OF PROPOSED ASSESSMENT FOR GEORGIA INCOME TAX PREVIOUSLY MAILED TO YOU, ASSESSMENT IS HEREBY ISSUED AGAINST YOU IN ACCORDANCE WITH I.C.G.A., 48-2-45. ANY APPEAL OF THIS ASSESSMENT MUST BE FILED WITHIN 30 DAYS OF THIS NOTICE IN ACCORDANCE WITH APPLICABLE GEORGIA LAW. A GENERAL DENIAL IS NOT SUFFICIENT AND BY LAW THE BURDEN IS UPON THE APPELLANT TO SHOW IN WHAT RESPECT THE ASSESSMENT IS IN ERROR.

DATE	JUNE 22, 1989	4300399	REICH, CHARLES J & SHIRLEY S
TAX	\$411.00	T	1106 E FAYETTEVILLE RD
INTEREST	12.33		RIVERDALE GA 30296
PENALTY	6.18		
PAYMENT	0.00		

**BALANCE OVERDUE**

REFER TO: 225 46 2871 OA TAX YEAR 1988

IF YOU HAVE PAID THIS TAX LIABILITY, WRITE DATE AND MANNER OF PAYMENT ON BACK OF THIS NOTICE AND RETURN IT TO THE ABOVE ADDRESS.

**PLEASE STATE SOCIAL SECURITY NUMBER IN ALL CORRESPONDENCE.**



This notice may not apply to you if you are in bankruptcy.  
If you have filed for bankruptcy and your case is currently  
pending, please write your case number where indicated and  
return to address furnished.

JULY 7, 1989

Case No. \_\_\_\_\_

This Notice is returned without action filed upon the following:  
a) MY LETTER TO MR JERRY A. ADAMS TAX CONSULTANT, DEPT OF REVENUE, DATED 3-30-89 and hand deliv-  
ated same DATE. SUB: Submission of 1988 Kentucky Foster Care (Welfare) and Demand for

Rebuttal of Kentucky State Taxes.

b) MY CERTIFIED MAIL # P 478 45721 TO SAME addressee, DATED 4-12-89, RECEIVED FOR 4-14-89,  
SUB: Filing of Form, 500X for the years 1980 thru 1988 with note (a) enclosing attached return

c) STIPULATED in Civil Action # 84-REC-30 Filed 5-25-89 - WALDEN ET AL VS COLLIS ET AL, REC-1-  
mand CO. Subeno Court (copy attached)

d) MY CERTIFIED MAIL # P 478 165722 TO DEPT OF REVENUE DATED 6-14-89, RECEIVED FOR 6-17-89,  
PENDING TO NOTICE OF Proposed Assessment DATED 5-16-89.

e) ORAL commitment by WELLEN CAWET, ASST AG, ATTY FOR REVENUE DEPT in Civil Action # 89-CV-  
13238-4, Clayton B. Subeno Court Filed 4-14-89. These letters forwarded ET AL VS COLLIS  
ET AL made in oral court JUL 29 '89 during hearing on Petitioners Request for 24-  
hourly relief.

*Charles J. Reich*  
CHARLES J. REICH 225-46-2871



## IN THE SUPREME COURT OF GEORGIA

Case No. 47018

MARCUS COLLINS, INDIVIDUALLY AND IN HIS CAPACITY  
AS GEORGIA STATE REVENUE COMMISSIONER, AND THE  
GEORGIA DEPARTMENT OF REVENUE,  
*Appellants,*

v.

JAMES E. WALDRON, JACK HOBBS, WALTER CYBART,  
AND ALL RETIRED FEDERAL EMPLOYEES  
SIMILARLY SITUATED,  
*Appellees.*

[July 12, 1989]

## SUPPLEMENTAL BRIEF OF APPELLANTS

This supplemental brief is submitted by the appellants under Rule 41 of the Georgia Supreme Court to address certain issues raised in the appellees' brief and at the oral argument of this case.

## ARGUMENT AND CITATION OF AUTHORITY

The taxpayers, on pages 4 and 5 of their brief, assert that the United States Supreme Court has sanctioned escrow funds under circumstances like those here. See *American Trucking Ass'n v. Gray*, 97 L Ed 2d 790, 793 (1987). Justice Blackmun's order in *Gray*, however, was based on decisions in *Private Truck Council of America v. New Hampshire*, 517 A.2d 1150 (N.H. 1986) and *American Trucking Ass'n v. Conway*, 508 A.2d 408 (Vt. 1986), where the courts found that no refund mechanism

existed for the return of taxes erroneously or illegally collected. See *Private Truck Council*, 517 A.2d at 1155-56; *American Trucking Ass'n*, 508 A.2d at 413-14. Based on the risk that Arkansas officials would take a similar position, Justice Blackmun ordered the disputed taxes escrowed pending a decision on their constitutionality. In this case, O.C.G.A. § 48-2-35 provides a procedure for the refund of state income taxes; this adequate remedy at law distinguishes this case from *Gray*, *Private Truck Council of America v. New Hampshire*, and *American Trucking Ass'n*, and precludes the equitable relief ordered by the Richmond Superior Court.

On page 6 of their brief, the taxpayers assert that violations of constitutional rights constitute "irreparable harm" *per se*. The taxpayers presumably mean that injunctive relief is always authorized when a constitutional right is implicated—i.e., that *no* legal remedy is adequate to redress a violation of such a right. In support of this claim, the taxpayers cite certain federal decisions in cases involving First Amendment rights, claims of racial discrimination in housing, etc. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) ("we believe that when housing discrimination is shown it is reasonable to presume that irreparable injury flows from the discrimination."); *Northern Pennsylvania Legal Services v. County of Lackawanna*, 513 F. Supp. 678, 685 (M.D. Pa. 1981) (First Amendment). Those cases do not stand for the broad proposition urged by the taxpayers here.

Although some courts have held that the very violation of certain fundamental constitutional rights can satisfy the irreparable harm requirement in obtaining preliminary injunctive relief, [citations omitted], the facts of this case do not fit under the ra-

tionale of those decisions. While [courts have] found that . . . First Amendment and right to privacy violations . . . could not be compensated by monetary damages or by prevailing in the litigation, the violation in this case *can* be more readily compensated.

*Cunningham v. Adams*, 808 F.2d 815, 822 (11th Cir. 1987) (emphasis in original). The taxpayers in this case challenge Georgia's income tax treatment of their federal retirement benefits. If it is eventually determined that this treatment is invalid, and that federal retirees have overpaid their state income taxes as a result, the measure of the injury is plain—it is the amount of the overpayment—and O.C.G.A. § 48-2-35 provides the legal mechanism for seeking redress.

The taxpayers' arguments in this case largely center on the fact that Georgia's refund statute does not permit class actions. They therefore conclude that the statutory procedure is inadequate for their purposes, thereby justifying the equitable relief granted by the trial court. This Court, however, disposed of an identical argument in *Blackmon v. Scoven*, 231 Ga. 307, 201 S.E.2d 474 (1973). In that case, the taxpayer disputed a penalty assessed against him when he purchased his automobile tag. The taxpayer brought a class action against the State Revenue Commisisoner and others, and he sought an injunction against the collection of such amounts, which the lower court granted. In reversing the trial court, this Court stated:

In our view the existence of the legal remedies provided by your public revenue statutes precludes the equitable class action that was sought here. In particular, the procedures set forth therein for returning illegally collected taxes . . . obviates the necessity of a class action based upon avoidance of a multiplicity of suits . . . .



. . . [I]f one successful contest of the penalty were made under [the refund statute], then the ruling would apply to all those persons in the same circumstances.

231 Ga. at 310-11, 201 S.E.2d at 477. Code Section 48-2-35 is, plainly, an adequate legal remedy for each individual taxpayer disputing Georgia's taxation of federal retirement benefits. Under the reasoning of *Blackmon v. Scoven*, the lack of a class action mechanism should not affect the analysis.

This 12th day of July, 1989.

Respectfully Submitted,

MICHAEL J. BOWERS  
Attorney General

H. PERRY MICHAEL  
Executive Assistant Attorney General

HARRISON KOHLER  
Deputy Attorney General

VERLEY J. SPIVEY  
Senior Assistant Attorney General

WARREN R. CALVERT  
Assistant Attorney General

132 State Judicial Building  
Atlanta, Georgia 30334  
Telephone: (404) 656-3340

IN THE SUPERIOR COURT OF CLAYTON COUNTY  
STATE OF GEORGIA

Civil Action File No. 89-CV-13238-4

THREE RETIRED SOLDIERS a/k/a AVERY T. SALTER, JR.,  
CHARLES J. REICH and ROBERT L. NEAL,  
*Petitioners,*

vs.

THE STATE OF GEORGIA and GOVERNOR JOE FRANK  
HARRIS and STATE REVENUE COMMISSIONER  
MARCUS E. COLLINS, SR.,  
*Respondents.*

[Sept. 19, 1989]

ORDER

Pursuant to Rule 19.1 of the Uniform Superior Court Rules, this Court has determined that the above-styled case shall be transferred to Fulton County Superior Court, where venue appropriately lies.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the above-stated case be and the same is hereby transferred to Fulton County, Georgia. The Clerk of the Superior Court of Clayton County, Georgia, is hereby directed to transfer said case to Fulton County, Georgia, upon payment of costs by the Plaintiffs.

The Clerk of the Superior Court of Clayton County, Georgia, is directed to compute the court costs within Rule 19.1(G) and shall notify counsel for Plaintiffs in writing of the amount of the court costs. This action shall



stand dismissed without prejudice unless the costs are paid within twenty (20) days as provided in Rule 19.1.

This 19th day of September, 1989.

/s/ KENNETH KILPATRICK  
Judge, Superior Court  
Clayton Judicial Circuit

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

Civil Action File No. D-71448

AVERY T. SALTER, JR., CHARLES J. REICH,  
and ROBERT L. NEAL,  
*Petitioners,*

v.

THE STATE OF GEORGIA, GOVERNOR JOE FRANK HARRIS,  
AND STATE REVENUE COMMISSIONER  
MARCUS E. COLLINS, SR.,  
*Respondents.*

[March 27, 1990]

**ORDER**

Upon full consideration of the entire record, Respondents' Motion to Dismiss or for Judgment on the Pleadings is hereby GRANTED.

Because of the Doctrine of Sovereign Immunity, the State may not be sued without its consent. Any consent to be sued which is extended by the State may not be expanded in scope and therefore must be strictly construed. *Ingalls Iron Works Company v. Blackmon*, 133 Ga. App. 164 (1974), citing *Schaffer v. Oxford*, 102 Ga. App. 710 (1960). Section 48-2-35(b)(4) of the Official Code of Georgia Annotated expressly waives sovereign immunity and allows for actions for tax refunds be brought against the State. However, a condition precedent to the State's consent to be sued pursuant to O.C.G.A. § 48-2-35 is the filing of a claim for refund

by the taxpayer. *Blackmon v. Georgia Independent Oilman's Association et al.*, 129 Ga. App. 171, 173 (1973), citing *Henderson v. Carter*, 229 Ga. 876 (1972).

Plaintiffs have failed to satisfy the condition precedent to waiver of sovereign immunity under O.C.G.A. § 48-2-35. Neither Plaintiffs' Petition for Declaratory Judgment and Injunctive relief nor any of the amendments thereto allege facts asserting that Plaintiffs have filed a claim for a refund as required by O.C.G.A. § 48-2-35 (b)(4). Accordingly, Plaintiffs cannot, as a matter of law, have standing to sue and Defendants' Motion to Dismiss should be and is hereby GRANTED. See *Id.*

This 27th day of MARCH, 1990.

/s/ Joel J. Fryer  
Judge, Fulton Superior Court, A.J.C.

IN THE SUPERIOR COURT OF CLAYTON COUNTY  
STATE OF GEORGIA

Civil Action File Number: 90CV-18383-4

LIEUTENANT COLONEL CHARLES J. REICH,  
U.S. ARMY (RET.),

*Plaintiff*

v.

MARCUS E. COLLINS, SR., Individually and in his capacity  
as Georgia State Revenue Commissioner, and  
GEORGIA DEPARTMENT OF REVENUE,  
*Defendants*

[April 19, 1990]

COMPLAINT FOR REFUND OF  
TAXES ILLEGALLY COLLECTED

COMES NOW the Plaintiff, who files this Complaint and shows this Court the following:

-1-

Defendant, MARCUS E. COLLINS, SR., is the Commissioner of the Georgia Department of Revenue. This Defendant is subject to the jurisdiction of this Court and can be served with process by second original at 410 Trinity-Washington Building, Atlanta, Georgia, 30334.

-2-

Defendant, GEORGIA DEPARTMENT OF REVENUE, is a Department of the government of the State of Georgia. This Defendant is subject to the jurisdiction



of this Court and can be served with process by second original at 410 Trinity-Washington Building, Atlanta, Georgia, 30334.

-3-

Plaintiff resides in Riverdale, Clayton County, Georgia. Lieutenant Colonel Reich retired from the United States Army in 1978 after twenty (20) years of active service. He began receiving military retirement benefits in 1978, and has paid Georgia income tax on these benefits since then.

-4-

On April 14, 1989, Plaintiff duly filed with Defendants, claims for tax refunds for years 1980 through 1988 pursuant to Official Code of Georgia, Annotated, Section 48-2-35.

-5-

On January 23, 1990, Defendants denied said claims and refused to pay the same.

-6-

The Public Salary Tax Act of 1939, 4 U.S.C., Section 111, provides, in pertinent part, that:

The United States consents to the taxation of pay or compensation for personal services as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

-7-

In 1980, the State of Georgia amended Georgia Code Annotated, Section 91A-3607 by Ga. L. 1980, p. 21, Section 17 (now codified, as amended, as Official Code of Georgia, Annotated, Section 38-7-27), providing that public pension or retirement fund benefits paid by the State out of twelve (12) listed funds or systems were not in-

cluded in determining Georgia taxable net income. The effect of this amendment was to eliminate the State income taxation of retirement benefits paid by the State.

-8-

After the 1980 amendment to Georgia Code Annotated, Section 91A-3607, the State continued to include federal retirement benefits in Georgia taxable income for purposes of determining the tax liability of federal retirees subject to Georgia taxation.

-9-

On March 28, 1989, the United States Supreme Court ruled in *Davis v. Michigan Department of the Treasury*, (489 US —, 103 L Ed 2d 891, 109 S CT —), that income tax statutes of the State of Michigan, which provided for the taxation of federal retirement benefits, but exempted retirement benefits paid by the state and its political subdivisions, violated federal law.

-10-

Recognizing the unconstitutionality of Official Code of Georgia, Annotated, Section 48-7-27, in light of the clear mandate of the *Davis* decision, Governor Harris signed House Bill Number 1 EX into law, on September 20, 1989, providing identical income tax treatment for federal and state pensions for taxable years beginning on or after January 1, 1989.

-11-

Georgia's income taxation of Plaintiff's federal retirement benefits for years 1980 through 1988 violates: (a) the Fifth and Fourteenth Amendments of the Constitution of the United States, the Public Salary Tax Act (4 U.S.C., Section 111) and 42 U.S.C., Section 1983; (b) Article 1, Section 1, Paragraph 2 and Article 7, Section 1, Paragraph 3 of the Constitution of the State of Georgia.



## COUNT I

-12-

Plaintiff realleges paragraphs (1) through (11) of this Complaint in this Court as if fully set forth herein.

-13-

Pursuant to Official Code of Georgia, Annotated, Section 48-2-35, Plaintiff herein, having paid taxes for years 1985 through 1988 which were illegally assessed and collected, is entitled to damages equal to all Georgia income taxes paid in federal retirement benefits from 1985 through 1988, plus the legal rate of interest.

## COUNT II

-14-

Plaintiff realleges paragraphs (1) through (13) of this Complaint in this Court as if fully set forth herein.

-15-

Section 48-7-27 of the Official Code of Georgia, Annotated, in subsection (a)(4)(A), excluded from Georgia net taxable income received from twelve (12) listed state pension or retirement funds or systems. The retirement benefits of Plaintiff's retired federal pay was not so excluded.

-16-

Official Code of Georgia, Annotated, Section 48-7-27 was in violation of the nondiscrimination provision of 4 U.S.C., Section 111, and was therefore invalid. See *Davis*, *supra*.

-17-

Official Code of Georgia, Annotated, Section 48-7-27 violated the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it denied Plain-

tiff equal protection of the laws, deprived him of property without due process of law and unlawfully took his property for public use without just compensation. Official Code of Georgia, Annotated, Section 48-7-27 was therefore invalid.

-18-

Official Code of Georgia, Annotated, Section 48-7-27 violated the provisions of 42 U.S.C., Section 1983, and 4 U.S.C., Section 111.

-19-

By reason of the foregoing, Plaintiff has been required to pay taxes pursuant to an invalid state scheme, and Plaintiff is entitled to damages equal to all Georgia income taxes paid on his federal retirement benefits from 1980 through 1988, plus the legal rate of interest.

WHEREFORE, Plaintiff prays as follows:

(a) that he recover of the Defendants the amount of all state income taxes paid on his federal retirement pay together with the legal interest thereon from 1980 through 1988 as well as court costs; and

(b) for such other relief as to which he may be lawfully and/or equitably entitled.

/s/

CHARLES J. REICH, LTC  
(USA Ret)  
Plaintiff  
Pro Se

1106 East Fayetteville Road  
Riverdale, Georgia 30296  
404/996-8803

IN THE SUPERIOR COURT OF CLAYTON COUNTY  
STATE OF GEORGIA

Civil Action File No: 90CV-18383-4

CHARLES J. REICH,

*Plaintiff,*

vs.

MARCUS E. COLLINS, SR., Individually and in his capacity  
as Georgia State Revenue Commissioner, and the  
GEORGIA DEPARTMENT OF REVENUE,  
*Defendants.*

[May 21, 1990]

**ANSWER**

Now come defendants Marcus E. Collins, Sr., State Revenue Commissioner, and the Georgia Department of Revenue, and answer and defend the complaint in the above-styled case as follows:

*First Defense*

The complaint fails to state a claim upon which relief can be granted against Marcus E. Collins, Sr., individually.

*Second Defense*

The complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983.

*Third Defense*

The relief sought by the plaintiff is partially barred by the statute of limitations and the doctrine of sovereign immunity.

*Fourth Defense*

The defendants respond to the individual paragraphs of the complaint as follows:

1 and 2.

Admit the allegations of paragraphs 1 and 2 of the complaint.

3.

Admit that plaintiff resides in Riverdale, Georgia; deny the remaining allegations of paragraph 3 of the complaint for lack of information or knowledge sufficient to form a belief as to the truth thereof.

4.

State that in or about April 1989, plaintiff filed Georgia income tax refund claims with the defendants; deny the remaining allegations of paragraph 4 of the complaint.

5.

Admit the allegations of paragraph 5 of the complaint.

6.

State that paragraph 6 of the complaint is a statement of law rather than an allegation of fact and therefore requires no response.

7.

Admit that in 1980, Georgia Code Section 91A-3607 was amended to include an income tax exemption for pension income received from the Teachers Retirement System of Georgia, and certain other public retirement systems; deny the remaining allegations of paragraph 7 of the complaint.

8 and 9.

Admit the allegations of paragraphs 8 and 9 of the complaint.



10.

Admit that on September 20, 1989, Governor Harris signed H.B. No. 1 EX into law, providing identical income tax treatment for federal, state, and private pensions for taxable years beginning on or after January 1, 1989; deny the remaining allegations of paragraph 10 of the complaint.

11.

Deny the allegations of paragraph 11 of the complaint.

12.

Defendants incorporate paragraphs 1 through 11 of this answer as if fully set forth herein.

13.

Deny the allegations of paragraph 13 of the complaint.

14.

Defendants incorporate paragraphs 1 through 13 of this answer as if fully set forth herein.

15.

Admit the allegations of paragraph 15 of the complaint.

16 through 19.

Deny the allegations of paragraphs 16 through 19 of the complaint.

20.

Deny each and every allegation of the complaint not hereinbefore specifically admitted, denied, or qualified.

21.

Deny that the plaintiff is entitled to any of the requested relief.

WHEREFORE, defendants pray:

- (1) That the Court enter judgment in favor of the defendants;
- (2) That costs be cast upon the plaintiff; and
- (3) For such other and further relief as the Court deems appropriate.

This 21st day of May, 1990.

Respectfully submitted,

MICHAEL J. BOWERS 071650  
Attorney General

/s/ \_\_\_\_\_  
DANIEL M. FORMBY 269350  
Senior Assistant Attorney General

/s/ \_\_\_\_\_  
WARREN R. CALVERT 105341  
Assistant Attorney General

PLEASE ADDRESS ALL  
COMMUNICATIONS TO:

WARREN R. CALVERT  
Assistant Attorney General  
132 State Judicial Building  
Atlanta, Georgia 30334  
Telephone: (404) 656-3340



# CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing ANSWER upon:

Charles J. Reich  
P.O. Box 2117  
Jonesboro, Georgia 30237

by placing the same into the United States mail with adequate first class postage placed thereon.

This 21st day of May, 1990.

/s/ \_\_\_\_\_  
WARREN R. CALVERT  
Assistant Attorney General

# IN THE SUPERIOR COURT OF CLAYTON COUNTY STATE OF GEORGIA

Case No. 90-CV-18383-4

CHARLES J. REICH,  
*Plaintiff,*  
v.

MARCUS E. COLLINS, SR., Individually and in his capacity  
as Georgia State Revenue Commissioner, and the  
GEORGIA DEPARTMENT OF REVENUE,  
*Defendants.*

[Oct. 18, 1991]

# MOTION FOR SUMMARY JUDGEMENT

The above-entitled matter came on for hearing before the HONORABLE KENNETH KILPATRICK, Judge, on October 18, 1991, in the Clayton County Judicial Circuit, commencing at approximately 3:40 p.m.

# APPEARANCES:

For the Plaintiff:	Carlton Henson, Attorney at Law
For the Defendant:	Warren Calvert, Attorney at Law

## TRANSCRIPT OF PROCEEDINGS

THE COURT: Let the record show this is the case of *Charles J. Reich versus Marcus E. Collins, Senior, individually and in his capacity as Georgia State Revenue Commisisoner, and the Georgia Department of Revenue*, Civil Action File 90-CV-18383-4. I believe that both parties have filed a motion for summary judgment; is that correct?

MR. HENSON: That's correct.

MR. CALVERT: That's correct, Your Honor, that's fine.

THE COURT: Okay. And both parties wish to argue their own and are prepared to argue against the other; is that right?

MR. HENSON: That's correct, Your Honor.

MR. CALVERT: That's correct, Your Honor.

THE COURT: All right. Now may I ask counsel for the State, which I guess would be appropriate at this time, to bring me up to speed, if there's any speed on, on these matters generally, because, frankly, I had not thought about this particular thing in some time.

As I remember, there was litigation going on in Richmond County on this subject; there was litigation going on in Fulton County on this subject, and I had thought all issues relative to these matters would be disposed of either through Judge Fleming's court, I think [2] it was, in Augusta—this is from my memory a year or two ago—or in whomever's court in Fulton County, and I have not given these matters any more thought. So from the State's perspective can you sort of tell me where we are on those sorts of things.

MR. CALVERT: Yes, Your Honor.

The cases that you're referring to are cases that were filed immediately in the aftermath of the U.S. Supreme Court's decision in *Davis*. There was the case that was filed here in Clayton Superior Court. Mr. Reich was a Plaintiff in that case.

THE COURT: I believe Mr. Salter was a Plaintiff in that case.

MR. CALVERT: He was also a Plaintiff as well and represented the Plaintiffs in that action. That was a declaratory judgment action.

A similar action was filed in Richmond Superior Court on behalf of Mr. Waldron and some other Plaintiffs. A third action was filed in Federal District Court for the Northern District of Georgia on yet another group of taxpayers who were represented by Mr. Henson.

What happened with those cases is the case before the court in Clayton County as well as the case that Judge Fleming had were transferred to Fulton County because that's where venue lay. Both of those cases were [3] subsequently dismissed because they were the wrong type of actions. They were declaratory judgments as opposed to refund actions brought under our statute. And when the Georgia General Assembly amended Georgia's income tax provisions for the tax years 1989 and forward, there simply was no controversy as to the present that would permit those cases to lie and they were dismissed.

The case that was brought in Federal Court was dismissed and the dismissal was affirmed in the Eleventh Circuit under the Federal Tax Injunction Act which basically says in tax matters you have to go into State Court if there's an appropriate remedy provided.

While those cases were going on, Mr. Reich elected to file a refund action under 48-2-35 which is Georgia's refund statute. As a consequence, his case has been proceeding forward essentially as the test case on the merits of the issue. There are other cases that are now pending in other Superior Courts. There are two cases pending in Fulton Superior Court, Plaintiffs who are represented also by Mr. Henson. There are two other cases pending in Dekalb Superior Court and there's one case pending in Dougherty Superior Court. Those cases have either been formally stayed by order of the Superior Courts or have



effectively been stayed by consent of the parties pending a disposition of the merits in this [4] litigation.

THE COURT: Good enough. That's where we are.

Hr. Henson, would you like to fill in anything in there?

MR. HENSON: No, I think Mr. Calvert has summarized it well, Your Honor. Basically, the other Superior Court has punted this matter to you.

THE COURT: All right.

MR. HENSON: And that's why we're here today.

THE COURT: All right. I don't run away from them. Maybe that's why I'm getting this because I don't do that. I'll be delighted to hear it and decide it.

\* \* \* \*

[The December 10, 1991 Order issued by the Superior Court of Clayton County, State of Georgia, Judge Kenneth Kilpatrick, is reproduced at Appendix E to Petition for Certiorari]

[The November 19, 1992 Decision of the Georgia Supreme Court is Reproduced at Appendix D to Petition for Certiorari]

[The December 2, 1993 Decision of the Georgia Supreme Court is reproduced at Appendix A to Petition for Certiorari]



(9)  
No. 93-908

Supreme Court, U.S.

FILED

APR 15 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

CHARLES J. REICH;  
*Petitioner,*  
v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the  
Supreme Court of Georgia

**BRIEF FOR PETITIONER**

CARLTON M. HENSON  
*Counsel of Record*  
MCALPIN & HENSON  
Eleven Piedmont Center  
Suite 400  
3495 Piedmont Road, N.E.  
Atlanta, Georgia 30305  
(404) 239-0774

## QUESTION PRESENTED

Whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

\_\_\_\_\_  
 No. 93-908

\_\_\_\_\_  
 CHARLES J. REICH,  
*Petitioner,*  
 v.

MARCUS E. COLLINS and  
 THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

\_\_\_\_\_  
 On Writ of Certiorari to the  
 Supreme Court of Georgia

\_\_\_\_\_  
 BRIEF FOR PETITIONER

\_\_\_\_\_  
 OPINIONS BELOW

The December 2, 1993 opinion of the Supreme Court of Georgia ("*Reich II*") (Pet. App. A) is reported at 263 Ga. 602, 437 S.E.2d 320. This Court's order remanding this matter to the Supreme Court of Georgia (No. 92-1276, June 28, 1993, Pet. App. B) is reported at 509 U.S. —, 113 S. Ct. 3028. The prior decision of the Supreme Court of Georgia, November 19, 1992, (*Reich I*) (Pet. App. D) and the order denying petitioner's Motion for Reconsideration at that time (Pet. App. C) are reported at 262 Ga. 625, 422 S.E.2d 846.



## JURISDICTION

The decision of the Georgia Supreme Court denying relief to Petitioner for unconstitutional and illegal taxation was issued December 2, 1993. The Petition for Certiorari was filed on December 8, 1993 and granted on February 22, 1994. 114 S. Ct. 1048. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

#### U.S. Const. art. VI § 2

\* \* \* \*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\* \* \* \*

#### U.S. Const. amend. XIV § 1

\* \* \* \*

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### State Statutes

In addition to those reproduced herein, the text of relevant statutes can be found in the Appendix to the Petition for Writ of Certiorari and the Appendix to the Brief *Amicus Curiae* on Behalf of the Military Coalition in Support of Petitioner.

### STATEMENT OF THE CASE

Petitioner, Charles J. Reich, is retired from the United States Army. Col. Reich served for 20 years, including a combat tour in Vietnam. He retired in 1978, and from

1978 through 1988 paid Georgia income tax on his federal retirement benefits.

Beginning in 1931, Georgia provided state income tax exemption for all federal and state retirees. 1931 Ga. Laws 24. These blanket exemptions were subsequently repealed for both groups, and Georgia began creating patchwork exemptions for classes of state retirees. For example, Georgia provided a tax exemption for retired teachers in 1943, employees under the state retirement system in 1949, and superior court clerks in 1968. 1943 Ga. Laws 668; 1949 Ga. Laws 160; and 1968 Ga. Laws 381. These efforts culminated in 1980, when Georgia consolidated these exemptions under one statute and provided that virtually all retirement benefits paid by the state were exempt from state income taxation. O.C.G.A. § 48-7-27 (1982 & Supp. 1993) (former Georgia Code Ann. § 91-A-3607).

No exemption was provided for federal retirees in the 1980 amendment, and federal retirees protested this unequal treatment. In 1981, 1982, and 1983, bills were introduced in the Georgia House of Representatives to provide an exemption for federal retirees. (Reich Dep., Exs. 18-23). These bills were not successful.

In February 1985, a group of federal retirees in Augusta, Georgia filed a class action in United States District Court challenging Georgia's taxing scheme and seeking refunds. The retirees asserted the tax on federal retirement benefits violated 4 U.S.C. § 111 and the constitutional doctrines of intergovernmental immunity and equal protection. The Eleventh Circuit dismissed the retirees' action on jurisdictional grounds holding that the state provided remedies that were plain, speedy and efficient under the Tax Injunction Act, 28 U.S.C. § 1341. *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986).<sup>1</sup>

<sup>1</sup> The remedies noted by the Eleventh Circuit were the refund statute and superior court review based on assessment appeal, an affidavit of illegality to execution, and appeal under Georgia's

During the 1980's, Georgia collected approximately \$40 to \$50 million per year in illegal taxes from federal retirees. (Thomassen Dep., p. 7, 13, Ex. 3, 4). Further, from 1985 through June 30, 1989, Georgia accumulated a revenue surplus in the amount of \$193.4 million. (Thomassen Dep., pp. 23-25).<sup>2</sup>

On March 28, 1989, this Court issued *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), which held illegal a Michigan tax scheme virtually identical to Georgia's.

Despite *Davis*, Georgia announced on April 8 that taxes on federal retirement income would still be due under state law on April 19, 1989. Further, the director of the Georgia Revenue Department's Income Tax Division "recommend[ed] pensioners file state income tax Form 500-X by April 17." (Thomassen Dep., Ex. 2). Form 500-X is Georgia's amended return form, and it was the form designated by the Revenue Department for filing refund claims after *Davis*.<sup>3</sup>

Administrative Procedure Act. *Waldron*, 788 F.2d at 738. Since then, the Georgia Supreme Court has held that the refund statute does not apply to federal retirees with claims based on *Davis*. See *Reich v. Collins I*, 262 Ga. 625, 422 S.E.2d 846 (1992), *vacated and remanded*, 509 U.S. —, 113 S. Ct. 3028 (1993). The inadequacy of superior court review under *McKesson* is discussed at pp. 25-26 below.

<sup>2</sup> The State projects that the accumulated revenue surplus will exceed \$200 million by June 1994. "Miller Tax Plan Hailed as Good Political Move But Advocates For State Programs Had Hoped For Funding Increases," *The Atlanta Constitution*, Dec. 18, 1993, § B at 1.

<sup>3</sup> O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993) provides:

A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on

In view of *Davis*, though, many federal retirees refused to pay the income tax due on April 17, 1989 for tax year 1988. Col. Reich was among those who refused to pay the remaining tax owed for 1988.

On March 30, 1989, Petitioner delivered a letter to the Revenue Department explaining that he was not paying the tax based on *Davis* and demanding refunds for 1978-1988. (Reich Dep., Ex. 25). On April 12, 1989, in accordance with the Department's April 8 announcement, Petitioner filed amended returns requesting refunds for 1980-1988. (Reich Dep., Ex. 26). Finally, with two other retirees, *pro se*, he filed a suit for declaratory and equitable relief on April 14.

The State responded by issuing assessment notices for the remaining 1988 tax to Col. Reich and other retirees including both penalties and interest. (Reich Dep., Exs. 27 and 29). (J.A. 10, 23). Petitioner has not paid this remaining 1988 tax, and to this day, the State has not rescinded or otherwise withdrawn its claims for penalties and interest.

In addition to the suit filed by Petitioner, two other suits were filed before April 17, 1989 seeking relief from the illegal and unconstitutional taxation. These suits represented the independent efforts of three groups of retirees seeking to find a remedy. All three suits were dismissed, at least in part, because of the existence of Georgia's refund statute, O.C.G.A. § 48-2-35.

In *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989),<sup>4</sup> the plaintiffs filed a class action seeking declaratory relief and equitable relief in the form of an escrow

warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

<sup>4</sup> Sgt. James Waldron was also the lead plaintiff in *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986) referenced on p. 3 above.



fund for the accumulation of taxes paid after *Davis*. Although the plaintiffs were initially successful, the Georgia Supreme Court issued a supersedeas stay of the escrow order.

Between the time of this stay and the Court's decision in October 1989, the Georgia legislature met in a special session. In September, the Legislature repealed the exemption for state retirees, but only for tax years after 1988. The legislative amendment did not address the taxes that were collected after *Davis* for tax year 1988 or provide any relief for the illegal taxation imposed on retirees before 1989.

On full consideration in *Collins v. Waldron*, the Georgia Supreme Court dismissed the action as moot in view of the legislature's repeal of the offending statute. With regard to the escrow fund for taxes collected after *Davis*, the Court ruled that "the refund statute (O.C.G.A. § 48-2-35) provides an adequate remedy for any vestigial disparity." 259 Ga. at 582, 385 S.E.2d at 75 n.1.

After the Georgia Supreme Court's decision in *Collins v. Waldron*, Col. Reich's suit for declaratory and equitable relief was dismissed by the trial court because he and his co-plaintiffs had not followed the procedural requirements of O.C.G.A. § 48-2-35. *Salter, Reich and Neal v. Georgia, et al.*, Fulton Superior Court, State of Georgia, Civil Action File No. D-71448 (Order of Mar. 27, 1990). (J.A. 31).

The third case, *Wetzel v. Collins*, Case No. 1:89-CV-758-ODE, was filed in the United States District Court for the Northern District of Georgia on April 14, 1989.<sup>6</sup> As in *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986), this case was dismissed on jurisdictional grounds pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The trial court held that Georgia's remedial scheme, in-

<sup>6</sup> Counsels of record in this case were the respective attorneys for plaintiffs and defendants in *Wetzel*.

cluding O.C.G.A. § 48-2-35 (the refund statute), provided a plain, speedy and efficient remedy. *Wetzel v. Collins*, United States District Court, Northern District of Georgia, Case No. 1:89-CV-758-ODE; Order of Sept. 26, 1990. This holding was affirmed by the Eleventh Circuit. (Case No. 90-9023, judgment of Aug. 23, 1991).<sup>7</sup>

In April 1990, after the declaratory suit brought by Col. Reich and two others was dismissed, and once he became eligible under the refund statute to file suit,<sup>7</sup> Col. Reich initiated this action challenging Georgia's tax scheme and seeking refunds of illegally collected taxes based on the principles set forth in *Davis* and the Fifth and Fourteenth Amendments to the U.S. Constitution. This case "has proceeded as the 'test case' for the identical claims of approximately 50,000 federal retirees" seeking relief in the wake of *Davis*. ([Commissioner's] Response to Application for Discretionary Appeal, Jan. 16, 1992, p. 4).<sup>8</sup>

<sup>6</sup> In both *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986) and *Wetzel v. Collins* (11th Cir. No. 90-9023), the Commissioner represented to the Eleventh Circuit that the refund statute was an available remedy for federal retirees.

<sup>7</sup> The refund statute requires claimants to file a claim with the Commissioner and wait for a denial or for a period of one year before filing suit. O.C.G.A. § 48-2-35(b)(1) (1991 & Supp. 1993). A denial was issued to Col. Reich by letter of January 23, 1990. (Reich Dep., Ex. 30). Col. Reich was the first retiree, and only one of a handful, who received a denial. Most claimants received no response to their claims. For retirees who did not receive notices of denials and who were awaiting the results of pending lawsuits in Georgia, the Attorney General has advised a few of them in writing that (1) the Department of Revenue takes the position that the statute of limitations on bringing suit does not begin to run until the Department of Revenue actually denies the refund claim, and (2) a final decision in any of the pending cases would automatically apply to each taxpayer similarly situated regardless of whether that person had filed his own lawsuit.

<sup>8</sup> Approximately 50,000 Georgia retirees filed refund claims under the refund statute. (Thomassen Dep., Ex. 5). The Department of



The trial court below found that the Georgia tax scheme was unconstitutional and illegal under *Davis*. The trial court also held that the refund statute, O.C.G.A. § 48-2-35, was applicable and barred claims for refunds before 1985. The trial court concluded that no refunds were due, though, because *Davis* could not be applied retroactively based on *Chevron Oil v. Huson*, 404 U.S. 97 (1971). (Pet. App. 1E).

On appeal, the Georgia Supreme Court held that *Davis* must be applied retroactively. Nevertheless, the Georgia Court held that Col. Reich was not entitled to any relief, holding, for the first time that Georgia's refund statute "does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid." *Reich v. Collins I*, 262 Ga. 625, 628, 422 S.E.2d 846, 849 (1992).

The Court also took "this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last." Neither of these holdings were supported by citations of authority.<sup>9</sup>

Petitioner filed a motion for reconsideration pointing out that this decision violated federal due process as set forth in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). This motion was denied by order of December 17, 1992. (Pet. App. C).

Revenue reports that the principal amount of these claims filed for 1985-1988 is \$62,747,287.

<sup>9</sup> The newfound protest requirement was particularly unfair because it squarely contradicted two separate Georgia statutes. O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993) (the refund statute) provides for refunds whether the taxes were paid "voluntarily or involuntarily." O.C.G.A. § 13-1-13 (1982) codifies the voluntary payment doctrine as it exists in Georgia and provides that, "Filing a protest at the time of payment does not change the rule prescribed in this Code Section."

Petitioner then filed a petition for writ of certiorari to this Court. On June 28, 1993, the petition was granted, the Georgia Court's November 19, 1992 decision was vacated, and the case was remanded for "further consideration in light of *Harper v. Virginia Dep't of Taxation*, 509 U.S. —, 113 S. Ct. 2510 (1993)." *Reich v. Collins*, 509 U.S. —, 113 S. Ct. 3028 (1993).

On remand, the Georgia Supreme Court concluded in a 5-2 decision that, "there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax." *Reich v. Collins II*, 263 Ga. 602, 604, 437 S.E.2d 320, 322 (1993). The Georgia Court concluded that Petitioner was not entitled to any relief.

#### ARGUMENT SUMMARY

Georgia did not provide its federal retiree taxpayers a clear and certain predeprivation remedy because Georgia imposed various sanctions and summary remedies designed to prompt retirees to pay their income taxes before their objections were heard. These sanctions included the risk of criminal prosecution, a fine of 25%, interest at 12%, garnishment, levy and attachment.

Even if these sanctions and summary remedies are not considered, the purported predeprivation remedies found to exist by the Georgia Supreme Court are individually unclear and uncertain. Declaratory judgment was not available to federal retirees because of the State's sovereign immunity and because Georgia's refund statute provided an available and adequate alternative remedy at law. Equitable relief was not available because O.C.G.A. § 48-7-84 (1982) bars injunctions against income taxes, and because the refund statute was an adequate remedy at law.

Administrative review and superior court review were uncertain because they depended upon the Revenue Department to issue an assessment or take other action. This could take a substantial period of time, and there was

no assurance that it would occur. Further, administrative jurisdiction for constitutional challenges does not exist in Georgia, and superior court review imposes the additional burden of a bond or other security equal to the tax.

Finally, Georgia's overall remedial scheme was unclear and uncertain because Georgia provided a clear and certain predeprivation remedy in the refund statute, but Georgia later eliminated this remedy after the time for other relief had expired.

#### ARGUMENT AND CITATION OF AUTHORITY

##### I. GEORGIA DID NOT PROVIDE FEDERAL RETIREES A CLEAR AND CERTAIN REMEDY THAT WAS FREE OF DURESS.

Georgia must provide meaningful backward looking relief or a predeprivation remedy free of duress for taxpayers, including federal retirees, challenging an illegal, unconstitutional tax. *Harper*, 509 U.S. at —, 113 S. Ct. at 2519-2520, citing *McKesson*, 496 U.S. at 31, 36-40. Without duress means that the predeprivation procedure must be free of sanctions and summary remedies designed to "prompt" or to "encourage" taxpayers to tender tax payments before their objections are entertained and resolved. *Harper*, 509 U.S. at —, 113 S. Ct. at 2520 n.10, citing *McKesson*, 496 U.S. at 38. All of the procedures offered by the State subject the taxpayer to various sanctions and summary remedies and thus require the State to provide meaningful backward looking relief. *Id.*, citing *McKesson*, 496 U.S. at 31. Further, as discussed below, pp. 17-29, the purported predeprivation remedies suggested by the State are neither clear nor certain.

The remedies proposed by the Georgia Supreme Court require a taxpayer to break the law and then argue that the statute is facially unconstitutional, all in the face of severe penalties should the argument fail. None of the procedures suggested by the State shield the taxpayer from these sanctions.

#### A. Georgia Law Imposes Sanctions and Summary Remedies Designed to Prompt the Payment of Income Tax When Due.

##### 1. Criminal prosecution.

Georgia imposes criminal sanctions for taxpayers who fail to make payment of income taxes when due. Mere nonpayment of a tax when due is punishable as a misdemeanor under O.C.G.A. § 48-7-2 (1982).<sup>10</sup> There is no requirement of willfulness under this statute.

In *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985), the Georgia Supreme Court addressed the issue of willfulness under this statute and concluded that "Section 48-7-2(a)(1) is unconstitutional on state law grounds to the extent it authorizes imprisonment for mere nonpayment of income taxes." 254 Ga. at 90, 326 S.E.2d at 730.

The Court, though, did not declare the entire statute unconstitutional, and the Court's focus on imprisonments left standing the alternative punishment of a criminal fine in the amount of \$1,000 under O.C.G.A. § 17-10-3 (1990

<sup>10</sup> O.C.G.A. § 48-7-2 (1982). Failure of person to pay tax, file return, keep records, etc., under this chapter; penalty.

(a) It shall be unlawful for any person who is required under this chapter to pay any tax, make any return, keep any records, supply any information, or exhibit any books or records for the purpose of computation, assessment, or collection of any tax imposed by this chapter to fail to:

- (1) Pay the tax;
- (2) Make the return;
- (3) Keep the records; or
- (4) When requested to do so by the commissioner:
  - (A) Supply the information; or
  - (B) Exhibit the books or records.

(b) In addition to other penalties provided by law, any person who violated subsection (a) of this Code section shall be guilty of a misdemeanor.



& Supp. 1993). Because they refused to pay 1988 income taxes after *Davis*, Petitioner and other retirees face the risk of criminal prosecution, the stigma and record of a conviction, and a fine of \$1,000 for each nonpayment.

Where willfulness is present, a Georgia taxpayer may be imprisoned for a misdemeanor under O.C.G.A. § 48-7-127(c) (1982 & Supp. 1993).<sup>11</sup> Similar to the federal income tax scheme, Georgia requires married taxpayers with gross incomes over \$3,000 to file and pay quarterly estimates. O.C.G.A. § 48-7-114 (1982 & Supp. 1993). Petitioner falls in this classification. (Reich Dep., pp. 22-29). Thus, Petitioner's failure to make his final estimated payment due April 17, 1989 puts him at risk under this statute as well.

The risk of criminal prosecution is present regardless of the intentions of the Commissioner. The only way to avoid this risk is to pay the tax.

O.C.G.A. § 48-2-81 (1991) imposes a duty on law enforcement officials:

It shall be the duty of all tax collectors, tax commissioners, sheriffs and constables to make sure that all persons violating any tax laws of this state are prosecuted for all such violations.

The Commissioner has repeatedly argued that this risk of criminal prosecution does not count because the taxpayer who has asserted "a reasonable, good faith pre-deprivation challenge" is not subject to criminal prosecu-

<sup>11</sup> O.C.G.A. § 48-7-2(c) (1982 & Supp. 1993).

(c) *Willful failure to file return or pay estimated tax.*

(1) It shall be unlawful for any person who is required under this article or regulations pursuant to this article to file any return of any tax or pay estimated tax or to keep any record, willfully to fail to file the return or pay the tax or to keep the records at the time or times required by law or regulation.

(2) In addition to any other penalties provided by law, any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor.

tion, and that only an official acting unreasonably or in bad faith would use this threat. *See, e.g.*, Brief in Opposition to Petition for Writ of Certiorari, p. 20. There is no authority in Georgia supporting this proposition urged by the Commissioner. There is no way for a taxpayer to determine if the Commissioner or the State will regard a challenge as "reasonable" or "in good faith." Georgia law provides no guidance.

The Commissioner's "evidence" to support his proposition is that Petitioner and other retirees have not been subjected to prosecution. But Petitioner is in the unique position of having a decision of this Court directly on point stating that the tax he refused to pay was illegal. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

Moreover, in at least one reported Georgia case, *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), a taxpayer with a reasonable, good faith challenge to a tax was threatened with criminal prosecution.

In *Wright*, the taxpayer challenged an occupational tax on constitutional grounds seeking a declaration that the tax was unconstitutional and an injunction against collection of the tax. Between the time suit was filed and the trial, the Commissioner threatened criminal prosecution. To avoid this, the taxpayer paid the tax. The taxpayer in *Wright* recognized that the only way to avoid the risk of criminal prosecution was to pay the tax. Even though the tax was declared unconstitutional and the injunction granted, the taxpayer never received any relief for the illegal taxes collected. *Wright*, 192 Ga. at 867-868, 16 S.E.2d at 875 (1941) (availability of refund statute precludes mandamus); *see also, Eibel v. Forrester*, 194 Ga. 439, 22 S.E.2d 96 (1942) (refund statute not applicable to occupational tax because tax preceded effective date of refund statute).

Thus, the decision of the Commissioner and state prosecutors not to pursue Petitioner and others in the face of



this Court's decision in *Davis* does not remove the risk of prosecution contained in O.C.G.A. §§ 48-7-2 (1982) and 48-7-127(c) (1982 & Supp. 1993). As the taxpayer in *Wright* experienced, it is this risk that creates the duress. See *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286 (1912).

The Commissioner has also suggested that under *Cheek v. United States*, 498 U.S. 192 (1991), Col. Reich could not have been prosecuted. Even assuming Georgia would have followed federal cases on this point, from 1978 through 1989, Petitioner could not have been aware of *Cheek* because it had not been decided. During that time, cases such as the Seventh Circuit's decisions in *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989) and *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), plainly indicated a substantial risk in choosing nonpayment.

For a taxpayer considering a challenge, not paying the contested tax always creates the risk that some prosecutor will pursue criminal prosecution. This is a particularly frightening prospect for retirees living on fixed incomes.

There is no remedy, no procedure, no course of action Petitioner or any taxpayer can take to eliminate the threat posed by these criminal statutes. In Georgia, any taxpayer who does not pay an income tax when due runs the risk of criminal prosecution.

## 2. Financial sanctions.

In Georgia, any taxpayer who fails to pay income tax is subject to a penalty equal to 25% of the tax, plus interest at the rate of 1% per month. O.C.G.A. §§ 48-7-86 (1982 & Supp. 1993), 48-2-40 (1991). The penalty attaches as soon as the tax is due and is assessed at the rate of ½% per month until the total penalty equals 25% of the tax due. "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid 'under duress' in

the sense that the State has not provided a fair and meaningful deprivation procedure." *McKesson*, 496 U.S. at 38.

Again, there is no requirement of willfulness. Georgia law does provide the Commissioner with discretion to waive the penalty if the failure was due to "reasonable cause," O.C.G.A. § 48-2-43 (1991), and, "no penalty shall be assessed" if the failure is due to "reasonable cause." O.C.G.A. § 48-7-86(a)(2) (1982 & Supp. 1993). But there is no guidance to measure the standard of "reasonable cause."

In any event, "reasonable cause" does not apply in this case. Col. Reich delivered his 1988 return to the Department of Revenue on March 30, 1989 showing his remaining quarterly estimate unpaid.<sup>12</sup> Accompanying the return he delivered a letter stating that he was not paying the estimate, and that he was demanding a refund of all payments previously made "[p]ursuant to the March 28, 1989 holding of the U.S. Supreme Court in *Davis v. State of Michigan*." (Reich Dep., Ex. 25). On April 12, he filed amended returns for 1980-1988, showing refunds due. (Reich Dep., Ex. 26). Again, he stated that the basis for the refund was *Davis*. Finally, Petitioner filed suit on April 14 for declaratory judgment and injunctive relief based on *Davis*. Despite these actions and *Davis*, on May 16 the Commissioner issued a "Notice of Proposed Assessment" against Petitioner for his final 1988 estimate and the notice sought to assess the statutory penalty and interest. (Reich Dep., Ex. 27) (J.A. 10).

Col. Reich promptly returned the Notice with notations pointing out (1) his March 30, 1989 letter, (2) the filing of his amended returns, and (3) the filing of his

<sup>12</sup> Georgia's tax return requires the taxpayer to verify the information contained therein "under penalty of perjury." (See, e.g., Reich Dep., Ex. 17). A taxpayer who misstates the information risks felony procedure under O.C.G.A. § 16-10-70 (1992) and is punishable by a fine of not more than \$1,000 or prison for 1-10 years or both.

lawsuit all based on *Davis*. (Reich Dep., Ex. 27) (J.A. 10).

Undeterred, the Commissioner issued an "Official Notice of Assessment and Demand for Payment" on June 22, 1989. This assessment increased the interest and penalty from the previous proposed assessment. (Reich Dep., Ex. 29) (J.A. 23).

Col. Reich mounted a bona fide, good faith and reasonable challenge to the disparate tax treatment of federal and state retirees. Two years ago, he won on the basic issue of the illegality of the tax. Still, he faces penalty and interest. Since April 1989, Petitioner has faced 60 months at 1% per month plus the 25% penalty. Thus, he potentially faces an exposure equal to 185% of his final 1988 quarterly estimate, and this number is increasing. Despite three years of litigation, the Commissioner has not withdrawn the penalty and interest sought on Petitioner's assessment. If a taxpayer is subject to the penalty under these circumstances, it is absurd to suggest that the penalty is not real.

### 3. Garnishment and Levy.

Georgia law further provides that all taxes are personal debts of the person required to file returns. O.C.G.A. § 48-2-55 (1991 & Supp. 1993). Pursuant to this provision, the property of the taxpayer is subject to garnishment and levy if a tax is not paid when due. Under the circumstances of this case, the taxpayer's property is immediately subject to garnishment and levy because no formal assessment is required where the return is accepted by the Commissioner as correct. *State v. Fuller*, 90 Ga. App. 349, 83 S.E.2d 69 (1954). (Assessment is an action taken only with regard to collection of tax exceeding that returned by the taxpayer). Petitioner showed the amount of his final 1988 quarterly estimate due on his return. Even though he simultaneously notified the Commissioner he was not paying it because of *Davis*, the Commissioner has accepted the amount shown as correct.

Georgia law provides no assurance that these collection procedures will be stayed while the legality of a tax is determined. See, e.g., *Gainesville-Hall County Economic Opportunity Org., Inc. v. Blackmon*, 233 Ga. 507, 508, 212 S.E.2d 341, 343 (1975) (acknowledging that an administrative hearing followed by superior court review does not suspend collection procedures).

### 4. Liens.

Finally, Georgia law provides that the Commissioner may impose a lien on all property of the taxpayer by entering a tax execution on the general execution docket in the county where real property of the taxpayer is located. O.C.G.A. § 48-2-56(e) (1991 & Supp. 1993). Here, the Commissioner has issued an assessment against the Petitioner that has become final according to its terms. Pursuant to O.C.G.A. § 48-2-56 (1991 & Supp. 1993), the Commissioner may record a lien in the general execution docket against all property owned by Petitioner. No procedure proposed by the Georgia Supreme Court automatically prevents the Commissioner from imposing this lien.

## B. The "Remedies" Proposed by the Georgia Supreme Court are Neither Clear Nor Certain.

### 1. Declaratory Judgment.

The procedure for a declaratory judgment is not a clear and certain predeprivation remedy because the State is generally immune from declaratory judgment actions based on sovereign immunity. *C.W. Mathews Contracting Co. v. Department of Transp.*, 160 Ga. App. 265, 265, 286 S.E.2d 756, 757 (1981); *Health Facility Inv., Inc. v. Georgia Dep't of Human Resources*, 238 Ga. 383, 385, 233 S.E.2d 351, 353 (1977). The exception to this general rule is a statutory waiver of sovereign immunity. *Busbee v. Georgia Conf., Am. Ass'n of Univ. Professors*, 235 Ga. 752, 758, 221 S.E.2d 437, 442 (1975); *Georgia State Bd. of Dental Examiners v. Daniels*, 137 Ga. App. 706, 707, 224 S.E.2d 820, 821 (1976). A



declaratory challenge to the income tax does not fall within any statutory waiver by the State of its immunity, and such an action would be dismissed for failure to state a claim upon which relief can be granted. *See, e.g., Meadows Motors, Inc. v. Department of Admin. Serv.*, 141 Ga. App. 224, 226, 233 S.E.2d 14, 15-16 (1977).

Indeed, this is precisely what happened to Petitioner's claims for declaratory relief that were filed in April 1989. The trial court noted that the State was immune from suit, that it had consented to suit under the refund statute, but that Col. Reich and his co-plaintiffs had not followed the procedural requirements of that statute. Petitioner's Davis based declaratory and equitable claims were therefore dismissed. (J.A. 31).

As the Respondents explained to the trial court in this case, Petitioner's 1989 case and the 1989 *Waldron* case were "dismissed because they were the **wrong types of actions**. They were declaratory judgments as opposed to refund actions brought under our statute." (J.A. 45) (emphasis added).

Additionally, while O.C.G.A. § 9-4-2 (1982) purports to provide for a declaratory judgment even when other remedies are available, Georgia courts have ruled that declaratory relief is not available where other statutory remedies have been specifically provided. *George v. Department of Natural Resources*, 250 Ga. 491, 493, 299 S.E.2d 556, 558 (1983); *see also Benton v. Gwinnett County Bd. of Educ.*, 168 Ga. App. 533, 535, 309 S.S.2d 680, 682 (1983). The declaratory judgment statute was not intended to be applicable to every controversy, since the statute does not take the place of existing remedies. *Mayor and Council of Athens v. Gerdine*, 202 Ga. 197, 42 S.E.2d 567 (1947).

As discussed below, pp. 26-29, Georgia's refund statute purported to provide a clear remedy for taxes "illegally assessed and collected." O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993). Any federal retiree who sought a declaratory judgment ran the risk that the action would be dis-

missed because of the presence of a specific statutory remedy in the form of the refund statute. In fact, the presence of the refund statute was used to defeat Petitioner's claim for declaratory relief. (J.A. 31). The availability of declaratory relief, then, was not clear and certain.

There are Georgia tax cases that have permitted declaratory judgment claims notwithstanding the availability of defenses based on sovereign immunity and notwithstanding the existence of a specific statutory remedy in the refund statute. None of these cases raise or discuss these defenses. *See, e.g., State v. Private Truck Council of Am., Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Dekalb County v. Allstate Beer, Inc.*, 229 Ga. 483, 192 S.E.2d 342 (1972). For whatever reason, the defendant (represented by the Attorney General) apparently chose not to assert these defenses. Part of the explanation may lie in the distinguishing fact that these are not income tax cases, and the plaintiffs were not facing the injunction bar in O.C.G.A. § 48-7-84 (1982) (discussed below at pp. 20-23). If an injunction is available against a tax, the taxing authority gains nothing by fighting declaratory relief; the same result can be obtained through a permanent injunction. Whatever the motivations, though, the selective application of these defenses *ipso facto* renders declaratory relief uncertain.

Finally, declaratory relief is not a clear and certain pre-deprivation remedy for the simple reason that it offers no assurance of a decision before the income tax is due. For Petitioner and most federal retirees, their income taxes are due quarterly. O.C.G.A. § 48-7-114 (1982 & Supp. 1993). The declaratory judgment procedure does not provide an assurance of even a hearing within 90 days of the filing of a complaint, much less a final order. Given the likelihood of an appeal, obtaining a final declaratory judgment before the tax is due is a practical impossibility. In fact, Petitioner filed a suit for declaratory relief in April 1989. (J.A. 5). He did not receive the trial court's order until March 1990 (J.A. 31), and that case ended



then only because Petitioner chose not to appeal. Instead, he initiated this action.

Nor can this problem of delay be solved by an injunction pending the outcome of the declaratory judgment procedure. As discussed below, Georgia law absolutely prohibits any injunction "restraining the assessment or collection" of any income tax. O.C.G.A. § 48-7-84 (1982).

The Georgia Supreme Court erred in holding that declaratory judgment provided Petitioner a clear and certain remedy.

## 2. Equitable relief.

Equitable relief was not a clear and certain remedy because O.C.G.A. § 48-7-84 (1982) prohibits any injunction restraining the collection or assessment of any income tax:

No action for the purpose of restraining the assessment or collection of any tax under this chapter [income taxes] shall be maintained in any court.

This statute stands as an absolute bar to enjoining the income tax pending a judicial determination of its illegality.

The Georgia Supreme Court stated in *Reich II* that injunctive relief was, in fact, available, relying on *James B. Beam Distilling Co. v. Georgia II*, 263 Ga. 609, 437 S.E.2d 782 (1993), petition for cert. filed, 62 U.S.L.W. 3503 (U.S. Jan. 13, 1994) (No. 93-1140). But *Beam II* was not an income tax case, and the prohibitions against injunctions in this statute did not apply there. If the Georgia court is saying in *Reich II* that this statute somehow does not apply to constitutional challenges, *Reich II* represents the first and only statement of that proposition in Georgia law. Thus, prior to *Reich II*, equitable relief was not clear and certain because it did not exist for income tax cases.

Further, equitable relief is not available in this case because the Georgia Supreme Court has ruled that it is

not available to federal retirees challenging Georgia's income tax on the basis of *Davis*. *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989). In *Collins*, federal retirees filed a class action shortly after *Davis* seeking an injunction requiring the Commissioner to escrow income taxes attributable to federal pensions. On April 14, 1989, the trial court granted this relief. *Collins*, 259 Ga. at 582, 385 S.E.2d at 74. Almost immediately, though, the Georgia Supreme Court issued a supersedeas stay of the injunction on April 19.

By the time the Georgia Supreme Court fully considered the case, the Georgia legislature had amended O.C.G.A. § 48-7-27(a)(4) (Supp. 1993) by eliminating the income tax exemption provided to state employees beginning January 1, 1989. The amendment did not address tax years 1988 and earlier, and it did not address taxes paid for 1988 on or after April 14, 1989. The amendment provided no relief for the illegal taxing in earlier years. Thus, there was a justiciable controversy regarding the illegality of taxes collected after *Davis* was decided on March 28, 1989.<sup>13</sup>

The central issue pending was the propriety of the injunction requiring the Commissioner to "maintain an escrow fund for all payments of income taxes attributable to federal pensions." *Collins*, 259 Ga. at 582, 385 S.E.2d at 74. With regard to this issue, Commissioner argued to the Georgia Supreme Court:

Code Section 48-2-35 provides a procedure for the refund of taxes erroneously or illegally assessed or collected; this is clearly an adequate remedy at law, within the meaning of the authorities cited above, so

<sup>13</sup> There is still a justiciable controversy in Georgia regarding the legality of these taxes. The State has retained all taxes collected after *Davis* was decided, and the State has issued assessments to federal retirees who refused to pay 1988 income taxes that were due after *Davis*.



as to preclude the equitable relief ordered by the superior court.

(J.A. 15).

The Georgia Court accepted the Commissioner's arguments and ruled that "the refund statute provides an adequate remedy at law" obviating the need for equitable relief. *Collins*, 259 Ga. at 582 n.1, 385 S.E.2d at 75 n.1. The plaintiffs were not entitled to the injunction they sought.<sup>14</sup>

In the 1989 suit brought by Col. Reich and two other retirees, equitable relief was also denied. In that action, Petitioner asked "[f]or immediate injunctive relief, prohibiting now, and in the future, the State of Georgia from continuing to assess illegal taxes against federal retirees' pensions for 1988 as well as for tax years prior thereto and for tax years hereafter." (J.A. 9).

The trial court dismissed Petitioner's case on the basis of sovereign immunity and because Petitioner had failed to follow the procedural requirements of the refund statute. (J.A. 31).

Thus, not once, but twice, Georgia courts denied equitable relief to federal retirees with *Davis* based claims.

These cases are consistent with prior Georgia law. Georgia courts have long held that equitable relief is precluded if there is an adequate remedy at law, and this proposition is codified in O.C.G.A. § 23-1-4 (1982): "Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law[.]" This principle has been applied in tax cases to

<sup>14</sup> The Georgia Court also noted that the record did not indicate that the three named plaintiffs had paid tax after April 14, 1989, suggesting that this was relevant to the decision. The Court is being disingenuous here; *Collins* was filed as a class action, relief was granted as a class action, there was never any dispute that members of the class paid taxes after April 14, 1989, and no inquiry was ever made with regard to when the individual plaintiffs paid their 1988 taxes.

defeat equitable relief.<sup>15</sup> See, e.g., *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972) and *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (both holding that the refund statute was adequate remedy at law to defeat equitable remedy of mandamus for refunds of illegal taxes).

The decision in *Reich I* that the refund statute did not apply was completely unprecedented; the Court cited no authority for its holding, and neither party briefed or argued this issue. The court just made up this holding to reach an end it considered desirable. Before *Reich I*, then, the refund statute provided an adequate remedy at law that precluded equitable relief.

Thus, equitable relief for federal retirees was unclear and uncertain because it was absolutely prohibited under O.C.G.A. § 48-7-84 (1982) and because there was an adequate remedy at law under the refund statute.

### 3. Administrative Review.

The *Reich II* majority next claims that there was a predeprivation remedy available under Georgia's Administrative Procedure Act ("APA") (O.C.G.A. § 50-13-12 (1986)).<sup>16</sup> In addition to duress, there are several due process problems with this holding.

<sup>15</sup> As noted at pp. 17-20 above, the Commissioner's decision not to raise this defense in some cases does not make equitable relief a clear and certain remedy in every case.

<sup>16</sup> O.C.G.A. § 50-13-12 (1986). Department of Revenue to hold hearing when demanded by aggrieved taxpayer; election of remedies.

(a) The Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes, or any failure of the department to act in such a matter if the failure is deemed an act under any provision of a tax statute administered by the department, or by any order of the department in such a matter other than an order on a hearing of which the taxpayer was given actual notice or at which the taxpayer appeared as a party.

First, jurisdiction under Georgia's APA to review a tax statute is unclear. The APA allows administrative review to any taxpayer "aggrieved by any act of the department." As the dissent noted in the decision below, though, Petitioner was not aggrieved by an act of the department, but by an unconstitutional act of the legislature. *Reich II*, 263 Ga. at 607, 437 S.E.2d at 323. Jurisdiction is ambiguous at best, and no Georgia decisions provide guidance.

Additionally, jurisdiction under the APA is not triggered until the Revenue Department takes some action. The Department may choose not to issue an assessment or wait to issue an assessment. Meanwhile, the taxpayer remains exposed to criminal prosecution.

In any event, no agency, not even the Department of Revenue, has the authority to strike a tax statute. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975); see also *George v. Department of Natural Resources*, 250 Ga. 491, 299 S.E.2d 556 (1983). Thus, the resort to administrative review would have been completely useless; a taxpayer seeking to void a tax statute as unconstitutional could not obtain that relief under the Administrative Procedure Act. As the Georgia Supreme Court has held, such a challenge would have been "futile at the time of its making." *Flint River Mills*, 234 Ga. at 386, 216 S.E.2d at 897. The availability of a "futile" challenge does not satisfy *McKesson* and *Harper*.

Finally, as with all of the proposed remedies, the risk of sanctions and collection efforts is always present. Even if the taxpayer appeals to superior court under O.C.G.A. § 50-13-19 (1986), that statute expressly provides that the appeal "does not itself stay enforcement of the agency decision." Thus, "[a] taxpayer who chooses [the administrative] remedy . . . is subject to the discretion of the Commissioner and/or reviewing court as to whether collection procedures will be stayed ([citations omitted])." *Gainesville-Hall County Economic Opportunity Org., Inc.*

*v. Blackmon*, 233 Ga. 507, 508, 212 S.E.2d 341, 343 (1975). See also *Reich II*, 263 Ga. at 607, 437 S.E.2d at 324 (Carley, J., dissenting).

The Commissioner can choose criminal prosecution, financial sanctions, levy, and garnishment while the administrative action is pending. If he chooses to levy on the taxpayer's property, he may even do so without providing notice. *Fowler v. Strickland*, 243 Ga. 30, 252 S.E.2d 459 (1979) (holding that where there is a final assessment in place, Commissioner may levy on taxpayers' bank accounts without notice).

#### 4. Superior Court Review.

The Georgia Supreme Court also held that another predeprivation remedy existed in the form of superior court review pursuant to O.C.G.A. § 48-2-59 (1991).<sup>17</sup> This remedy is not certain because it depends entirely on initial action by the Commissioner—issuance of an "order, ruling, or finding." If the Commissioner chooses not to issue an assessment or issue some other order, the taxpayer is precluded from using this procedure. Once a taxpayer chooses not to pay the tax, there is no certainty of an assessment. For example, the Commissioner could choose criminal prosecution under O.C.G.A. § 48-7-2 (1982) without ever issuing an assessment.

In this case, no assessment is required to begin collection efforts because Petitioner returned his final 1988 quarterly estimates as due on the face of his return. Because the Commissioner accepted this amount as correct, this amount became due and payable without assessment. See *State v. Fuller*, 90 Ga. App. 349, 351, 83 S.E.2d 69, 71 (1954) (no assessment proceeding is required

<sup>17</sup> O.C.G.A. § 48-2-59(a) (1991) provides:

Except with respect to claims for refunds, either party may appeal from any order, ruling, or finding of the commissioner to the superior court of the county of the residence of the taxpayer[.]



where the return is accepted by the Commissioner as correct).

Thus, the Commissioner could enter an execution on the general execution docket which would impose a lien on all property and rights to property belonging to Petitioner. O.C.G.A. § 48-2-55 (1991 & Supp. 1993). Without the issuance of an assessment, Petitioner could not obtain superior court review under O.C.G.A. § 48-2-59 (1991).<sup>18</sup>

Further, while subjecting the taxpayer to all of the risks discussed above at pp. 11-17, this procedure imposes an additional burden. To obtain jurisdiction in superior court, the taxpayer must post a bond equal to the tax or show real property owned in the State that is valued in excess of the amount of tax in dispute. The surety posting the bond will require a substantial fee and some type of security from the taxpayer, with the result that some real or personal property of the taxpayer will be encumbered pending the outcome of the litigation. A surety bond or other security are immediate and substantial property interests.

#### C. Georgia's Refund Statute Provided a Plain Remedy.

The clear and certain standard of *McKesson* is not met because Georgia, like several other states, has a

<sup>18</sup> Theoretically, Petitioner could seek superior court review of the execution itself by filing an affidavit of illegality under O.C.G.A. § 48-3-1 (1991). But Petitioner would have to know of the execution, and this procedure does not require the Commissioner to give notice. Indeed, the Commissioner may levy on the taxpayer's property without giving notice. See *Fowler v. Strickland*, 243 Ga. 30, 33, 252 S.E.2d 459, 461 (1979). The affidavit of illegality itself does not remove the execution. Finally, this procedure also requires the taxpayer to post a bond or pay the tax. O.C.G.A. § 48-3-1 (1991). This procedure was repeatedly argued in the Georgia Supreme Court by the Respondents. See Appellees' Brief on Remand, p. 8; Appellees' Reply Brief on Remand, pp. 18, 20; Appellees' Supplemental Reply Brief, pp. 7-9; Appellees' Post-Argument Supplemental Brief, p. 7. However, given the circumstances referenced above, even the *Reich II* majority was not bold enough to hold that this procedure was clear and certain.

refund statute that provides an unqualified right to refunds of illegal taxes. The clear and certain standard is violated when the State provides a post-deprivation remedy and then eliminates it after the time for other relief has expired. This remedial shell game violates due process. See *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). See also, *Cambridge State Bank v. James*, No. 10-89-2097, slip op. pp. 11-12 (Minn. Apr. 1994) (1994 WL 106516) (refunds of unconstitutional taxes required by *McKesson*); and *Marx v. Broom*, No. 91-CC-00476, slip op. p. 9 (Miss. Feb. 24, 1991) (1994 WL 52850) (retroactive elimination of refund statute violates due process).

Regardless of the merit of any other remedy, the purported availability of the refund statute made Georgia's entire remedial scheme unclear and uncertain.

At the time *Davis* was decided, it was settled Georgia law that the refund statute provided a remedy for illegal and unconstitutional taxes. See *Parke, Davis & Co. v. Cook*, 198 Ga. 457, 31 S.E.2d 728 (1944) (due process and commerce clause challenges to income tax properly brought under refund statute); see also, *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972) (constitutional challenge to sales tax dismissed because plaintiffs failed to follow refund statute procedures); *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (mandamus denied because refund statute provided adequate remedy at law for constitutional challenge to tax).

In July 1989, in *Collins v. Waldron*, the Respondents here argued that if the tax treatment of federal retirees was invalid:

[T]he measure of the injury is plain—it is the amount of the overpayment—and O.C.G.A. § 48-2-35 provides the legal mechanism for seeking redress. (J.A. 27) (emphasis added).

In this case, the Respondents told the trial court in October 1991 that other Georgia cases had been "dis-



missed because they were the wrong type of actions. They were declaratory judgments as opposed to refund actions brought under the statute." (J.A. 45).

As discussed above at pp. 20-22, the Georgia Supreme Court ruled in 1989 that the refund statute applied to the very tax at issue here. *Collins v. Waldron*, 259 Ga. at 582 n.1, 385 S.E.2d at 75 n.1 (1989). Until *Reich I* was decided in November 1992, no Georgia court, and certainly not the Revenue Commissioner, had ever suggested that the refund statute was unavailable. The State never pled or argued in this case or any other *Davis* case that the refund statute did not apply.

More recently, Georgia has provided refunds to taxpayers who paid a sales tax on private sales of used vehicles. The tax was declared illegal under Georgia law in *Tedder v. Collins*, Cobb Superior Court, State of Georgia, Civil Action No. 93-1-5530-28 (Order of December 3, 1993). Without waiting for refund claims to be filed, the Governor announced that refunds with interest would be paid. "Miller says he'll refund \$34 million from tax on used-vehicle sales," *The Atlanta Constitution*, Dec. 15, 1993, § A at 1.

The taxpayers there received refunds even though the sales taxes were paid under a law "itself subsequently declared to be unconstitutional or otherwise invalid." *Reich v. Collins I*, 262 Ga. 625, 628, 422 S.E.2d 846, 849 (1992). The Attorney General recognized this inconsistency when he wrote to the Governor, "payment in this case could seriously jeopardize our positions in the other pending refund cases." See "Bowers opposes refund of vehicle tax fears State would be forced to repay other proceeds," *The Atlanta Constitution*, Dec. 10, 1993, § D at 3 (quoting letters from Attorney General Bowers to the Governor and the Revenue Commissioner).

Both before and after *Reich I*, Georgia has consistently applied the refund statute to unconstitutional and illegal taxes. The rationale in *Reich I*, implicitly affirmed in

*Reich II*, was conjured up solely to defeat the federal rights raised in this case.

The Respondents seek to punish more than 50,000 federal retirees who followed their advice and the "plain" remedy of the refund statute. Prior to *Reich I*, retirees had no notice they were required to take advantage of ambiguous predeprivation procedures to qualify for a refund. They could not have known that by choosing the refund statute, their right to relief would be foreclosed.

Georgia retirees were required to play remedy roulette. The most appropriate and apt remedy was the refund statute because the retiree taxpayer avoided penalties, interest and the risk of criminal prosecution. If retirees placed their bets on the "wrong" remedy, though, they lost their gamble, the illegal tax and any right to relief. The clear and certain mandate of *McKesson* is not met under these circumstances.

## II. "MEANINGFUL BACKWARD LOOKING RELIEF" REQUIRES REFUNDS.

Georgia's failure to provide a clear and certain predeprivation remedy requires the State to provide meaningful backward looking relief. *Harper*, 509 U.S. —, 113 S. Ct. at 2519, citing *McKesson*, 496 U.S. at 31. Georgia law purports to provide no such relief. In fact, the Georgia Supreme Court has twice considered *Davis* claims under circumstances where it knew that *Davis* applied retroactively, and where it knew that *McKesson* provided the guiding principles of the requirements of due process. Both times, the Georgia court denied all relief. Thus, the question of what are the minimum backward looking requirements of due process in this case is a federal question squarely presented to this Court.

This Court has indicated that "a state may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a non-discriminatory scheme.'" *Harper*, 509 U.S. at —, 113

S. Ct. at 2520, citing *McKesson*, 496 U.S. at 40. In this case, though, because of the passage of time, only full refunds will provide meaningful relief. As this Court noted in *McKesson*, beyond some temporal point, a retroactive tax may violate due process. *McKesson*, 496 U.S. at 40 n.23, citing *Welch v. Henry*, 305 U.S. 134, 147 (1938). Here, a retroactive tax would affect state retirees who paid taxes as long as eight years ago.

Future credits or a future tax exemption for federal retirees will not provide adequate relief because thousands of federal retirees who paid the illegal tax have died. Many others have moved from Georgia. Further, there are many federal retirees now residing in Georgia who never paid the illegal tax but who would stand to benefit from a blanket credit or exemption.

Adequate relief means full refunds for the tax years at issue. The most analogous Georgia cause of action to Petitioner's claims is money had and received, for which there is a four year limitation period. O.C.G.A. § 9-3-25 (1982). Thus, Petitioner and all other federal retirees burdened by the unlawful tax are entitled to refunds, plus interest, of the illegal taxes paid during this period.

### CONCLUSION

The fundamental force driving this litigation is Georgia's belief that *Davis* was wrongly decided. As the Commissioner recently argued to the Georgia Supreme Court, "four sitting justices on the U.S. Supreme Court itself regard *Davis* either as flatly wrong, or as sufficiently debatable that states with income tax schemes simliar to Michigan's could reasonably have assumed their statutes to be valid." (Appellees' Brief on Remand from U.S. Supreme Court, pp. 14-15). Since the validity of *Davis* is "debatable," it need not be followed, and this premise justifies any action to prevent *Davis* from becoming law in Georgia. Under this view, the State can disregard its

own law, make up new remedies, or issue contradictory decisions as needed to deny enforcement of federal rights.

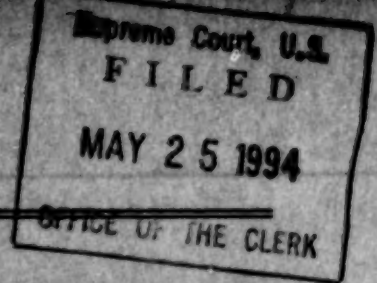
This approach, though, violates the Supremacy clause and this Court's express holding that, "a state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolity or want of wisdom.'" *Testa v. Katt*, 330 U.S. 386, 393 (1947). The Georgia Supreme Court has twice denied relief to federal retirees when it knew *Davis* was retroactive and when it knew *McKesson* provided guiding due process principles. Only a mandate of "full refunds to those burdened by the unlawful tax" will insure meaningful relief to federal retirees. *Harper*, 509 U.S. at —, 113 S. Ct. at 2520.

Respectfully submitted,

CARLTON M. HENSON  
*Counsel of Record*  
 MCALPIN & HENSON  
 Eleven Piedmont Center  
 Suite 400  
 3495 Piedmont Road, N.E.  
 Atlanta, Georgia 30305  
 (404) 239-0774



(19)  
No. 93-908



In The  
**Supreme Court of the United States**

October Term, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,

*Respondents.*

On Writ Of Certiorari  
To The Supreme Court Of Georgia

**BRIEF FOR RESPONDENTS**

WARREN R. CALVERT  
Senior Assistant Attorney  
General  
(Counsel of Record  
for Respondents)

MICHAEL J. BOWERS  
Attorney General

DANIEL M. FORMBY  
Senior Assistant Attorney  
General

*Attorneys for Respondents*

Georgia Department of Law  
132 State Judicial Building  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300  
(404) 656-3370

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964  
OR CALL COLLECT (404) 343-2831

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## QUESTION PRESENTED

Whether the predeprivation procedures available to Petitioner under Georgia law to dispute the state income tax imposed on his federal retirement benefits satisfied Due Process.

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No. 93-908

In The

**Supreme Court of the United States**  
October Term, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ Of Certiorari  
To The Supreme Court Of Georgia

BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS AND  
STATUTES INVOLVED

Petitioner's statement of the "Constitutional Provisions And Statutes Involved" does not refer to or append a copy of Georgia's affidavit of illegality provision, O.C.G.A. § 48-3-1, which is one of Georgia's predeprivation tax procedures. The text of O.C.G.A. § 48-3-1 is set out in Appendix A hereto.

## STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, see O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. See O.C.G.A. § 48-7-27(a)(5) (Supp. 1993).

Shortly after *Davis* was announced, Petitioner Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Georgia Department of Revenue for Georgia income taxes which he had previously paid on his military retirement benefits for the years 1985 through 1988. (Reich Dep., Exh. 6-9). At the time such taxes were paid, Col. Reich did not protest or otherwise indicate that he believed the tax treatment of his retirement benefits to be invalid. (Reich Dep., pp. 34 and 52). When the Department denied his claims (Reich Dep., Exh. 30), the taxpayer brought suit under the income tax refund statute, O.C.G.A. § 48-2-35, contending that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to

the U.S. Constitution, and comparable provisions of the Georgia Constitution. (J.A. 33-37). Both the Respondents and the taxpayer subsequently filed motions for summary judgment. (R. 23 and 123).

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. Petition for Writ of Certiorari, Appendix E. However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Col. Reich's application for discretionary appeal. See O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) (hereinafter "*Reich I*"). However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35, which provides for refunds of taxes "erroneously or illegally assessed and collected", did not apply to taxes paid under a law later held unconstitutional, and that Col. Reich was therefore not entitled under that statute to the refunds he sought. After his motion for reconsideration was denied, the taxpayer filed a petition for certiorari with this Court, contending, *inter alia*, that Due Process entitled him to refunds if Georgia's refund statute did not.



On June 18, 1993, this Court issued its decision in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). In *Harper* the Court held, based on the reasoning of its earlier decision in *Beam*, that *Davis* applied retroactively to tax years before 1989. *Id.* at 2516-18. The Court noted at the same time, however, that "federal law does not necessarily entitle [federal retirees] to a refund" of amounts paid on their benefits for years before 1989 under income tax statutes invalidated by *Davis*. *Id.* at 2519. "Rather, the Constitution requires [a state simply] 'to provide relief consistent with federal due process principles.'" *Id.* at 2519 (quoting *American Trucking Assns. v. Smith*, 496 U.S. 167, 181 (1990) (plurality opinion)). The Court reversed the Virginia court's earlier holding that *Davis* applied prospectively only, but remanded for resolution of the distinct remedial issues which remained. *Id.* at 2520. Two weeks later, this Court vacated the decision in *Reich I*, and remanded for reconsideration in light of *Harper*. 61 U.S.L.W. 3867 (U.S. June 28, 1993).

On December 2, 1993, the Georgia Supreme Court held on remand that Due Process did not entitle the taxpayer to a refund of the taxes he paid on his federal retirement benefits prior to the decision in *Davis*, since Georgia law provided adequate predeprivation procedures by which he could have contested his taxes prior to payment. *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) (hereinafter "*Reich II*"). The taxpayer filed his petition for certiorari on December 8, 1993, and certiorari was granted on February 22, 1994.

### Response to the Petitioner's Statement of the Case

Petitioner's Statement Of The Case contains numerous assertions that are unsupported in the record and potentially misleading. For example, the taxpayer states that after *Davis* "the director of the Georgia Revenue Department's Income Tax Division 'recommend[ed] pensioners file state income tax Form 500-X by April 17.'" Petitioner's Brief, p. 4. No effort was made in the trial court to establish a record concerning any such statements. Except for a newspaper article which coincidentally refers to statements purportedly made by a Revenue Department official, which was attached for other reasons as an exhibit to a deposition taken by the taxpayer, *see Thomassen Dep.*, Exh. 2, there is nothing whatsoever in the record regarding such statements.<sup>1</sup> Moreover, Col. Reich seems to be suggesting that statements made after *Davis* misled him into foregoing a pre-payment challenge to his taxes, even though the amounts which he seeks to recover were paid prior to this Court's decision in *Davis*.

Col. Reich makes factual assertions concerning other federal retirees, none of whom are parties to this case. *See, e.g.*, Petitioner's Brief, p. 5 ("many federal retirees refused to pay the income tax due on April 17, 1989 for tax year 1988"); *id.* ("The State . . . issu[ed] assessment notices for . . . 1988 tax to Col. Reich and other retirees including both penalties and interest."); *id.* at 7 n.7 ("Col. Reich was the first retiree, and only one of a handful, who received a denial. Most claimants received no response to

<sup>1</sup> Petitioner refers elsewhere in his brief to newspaper articles that are not a matter of record, and he makes factual assertions based thereon. *See* Petitioner's Brief, p. 28.



their claims."); *id.* (referring to advice received by other retirees from the Georgia Attorney General). Although some of these statements may be accurate at least in part, it is unclear what Col. Reich's purpose is in including them as part of his Statement Of The Case, and Respondents therefore feel compelled to point out that none is a matter of record.

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### SUMMARY OF THE ARGUMENT

Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy Due Process. In recognition of the State's "exceedingly strong interest in financial stability", the Court has held that a State need not provide any predeprivation process. Instead, a State may require taxpayers to pay first and litigate their liabilities by way of a post-deprivation (i.e., refund) action later. If the State chooses to provide a predeprivation hearing, however, the availability of such a procedure will be sufficient by itself to satisfy Due Process. Taxpayers who fail to avail themselves of such a procedure, and who pay a tax under a statute later held unconstitutional, cannot contend that their Due Process rights have been violated.

There were numerous predeprivation procedures available under Georgia law by which Petitioner could have challenged the Georgia income tax imposed on his federal retirement benefits prior to payment: an action for declaratory judgment or injunctive relief; an appeal under Georgia's Administrative Procedure Act from a

deficiency assessment of additional taxes; an appeal directly to superior court from a deficiency assessment; or an affidavit of illegality. Under Georgia's statutory and case law, each such procedure would have given Petitioner a fair opportunity to contest his liability prior to payment and a clear and certain remedy if he prevailed – that is, relief from any obligation to pay the disputed amounts. Petitioner's arguments to the contrary center principally around his apparent belief that Due Process is not satisfied if *any* doubt can be raised regarding the availability or scope of the pre-payment procedure. There is no support for such a Due Process standard.

Petitioner was not subjected to "constitutionally significant" duress forcing him to forego a predeprivation challenge and pay his disputed taxes. Due Process is a flexible standard, which should properly take into account the State's legitimate financial interest in seeing that taxes which are legally due are promptly paid. According to Petitioner and his amici, "constitutionally significant" duress exists whenever a State may impose penalties on a taxpayer who contests his liability prior to payment and loses – even, assumedly, if he has asserted frivolous claims or disputed his liability in bad faith. This "test" ignores the State's financial interests. In fact, the various statutory provisions to which Col. Reich objects – those concerning Georgia's failure-to-pay penalty, interest on unpaid liabilities, potential criminal prosecution, and various collection procedures – are all reasonable measures designed to see that taxes are paid if they are legally owed, and none is at all like the sanctions and penalties involved in the Court's prior cases concerning "duress".

Petitioner's arguments concerning the Due Process adequacy of Georgia's predeprivation tax procedures depend in large part on Petitioner's claim that the Georgia Supreme Court, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a statute later held unconstitutional, deprived him of Due Process. This is precisely the question which this Court refused to accept for review. Petitioner and his amici try to insinuate that issue back into this case because they do not want to believe that a taxpayer can ever properly be denied a refund of taxes paid under a statute which is later invalidated, except perhaps for failing to comply with a refund statute's procedural requirements. The Court's decisions are clear, however: a State which has provided a taxpayer with adequate pre-payment procedures has done all that Due Process requires.

The amicus brief of James B. Beam Distilling Co. ("Beam"), which has been filed ostensibly to address the issues in this case, in fact argues the merits of Beam's own lawsuit against the State of Georgia. (Beam's lawsuit is now pending on petition for certiorari with this Court.) Although the issues overlap to some extent, this case and Beam's are distinct, involving, *inter alia*, different tax statutes and other predeprivation procedures.

Finally, even if Georgia's predeprivation tax procedures did not satisfy Due Process, Petitioner is not entitled to a judgment directing that refunds be paid. Sovereign immunity precludes such a recovery, and the Court should either so hold or permit the Georgia courts to consider the issue on remand. Even without regard to sovereign immunity, however, the State's reasonable reliance interests and other equitable considerations

should be taken into account in deciding what relief should be given to Petitioner. When these factors are properly weighed, it is clear that refunds should not be ordered. The Court should either deny outright an award of refunds, or permit the Georgia courts themselves, on remand, to weigh these factors in determining the appropriate relief.

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## ARGUMENT

### I. THE PREDEPRIVATION PROCEDURES AVAILABLE TO PETITIONER UNDER GEORGIA LAW TO DISPUTE THE STATE INCOME TAX IMPOSED ON HIS FEDERAL RETIREMENT BENEFITS SATISFIED DUE PROCESS

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) this Court stated:

[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

*Id.* at 31 (footnotes omitted). However, "[i]n order to satisfy the commands of the Due Process Clause [, the] State may choose to provide a form of 'predeprivation process' ". *Id.* at 36-37 (footnotes omitted). If Georgia's predeprivation tax procedures provided Petitioner with "a fair opportunity to challenge the accuracy and legal validity of [his] tax obligation [prior to payment and] a



'clear and certain remedy' " if he prevailed, *id.* at 39, Due Process has been fully satisfied. *See id.* at 38 n.21 ("The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure.") (emphasis added). These principles were reaffirmed in *Harper*, 113 S. Ct. at 2519.

#### A. Georgia Law Provided Petitioner With Numerous Predeprivation Tax Procedures

The "clear and certain" remedy provided to the taxpayer who prevails under any one of Georgia's predeprivation tax procedures is obvious: he is relieved of any obligation to pay the disputed amounts. There is no question but that such relief would have fully vindicated Col. Reich's constitutional rights concerning the taxing of his federal retirement benefits. Col. Reich's arguments regarding the Due Process sufficiency of Georgia's predeprivation tax procedures center instead on his apparent belief that if *any* doubt can be raised concerning the availability or scope of such a procedure, the procedure cannot satisfy Georgia's Due Process obligation. *See, e.g.*, Petitioner's Brief, p. 18 ("Any federal retiree who sought a declaratory judgment ran the risk that the action would be dismissed"); *id.* at 24 ("[J]urisdiction [under Georgia's Administrative Procedure Act] is ambiguous"). A taxpayer is not deprived of a "fair opportunity" to litigate his tax liability unless the State's predeprivation procedures meet Col. Reich's standard. Except in extraordinary circumstances not present here, litigants properly

must "assume the risk that the ultimate interpretation by the highest court [of any particular procedure] might differ from [their] own." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 n.9 (1930).

Petitioner's specific arguments concerning Georgia's particular predeprivation procedures are addressed below.

#### 1. Suit for declaratory judgment or injunctive relief

In the opinion below, the Georgia Supreme Court noted that one predeprivation procedure which Col. Reich could have used to challenge his taxes prior to payment was a lawsuit for declaratory judgment and injunctive relief. On pages 17-18 of his brief, Col. Reich asserts that:

the State is generally immune from declaratory judgment actions based on sovereign immunity. [Citations omitted.] The exception to this general rule is a statutory waiver of sovereign immunity. [Citations omitted.] A declaratory challenge to the income tax does not fall within any statutory waiver by the State of its immunity, and such an action would be dismissed for failure to state a claim upon which relief can be granted. [Citations omitted.]

According to Col. Reich, "this is precisely what happened to Petitioner's claims for declaratory relief that were filed in April 1989." *Id.* at 18.

However, notwithstanding the bar which sovereign immunity would normally present to a lawsuit against



the government, there are numerous Georgia cases which have entertained actions for declaratory judgment and for injunctive relief brought by taxpayers to challenge unconstitutional statutes and taxes. See, e.g., *Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (challenge to alcohol tax statute upheld); *City Council of Augusta v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979) (sales tax statute); *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981) (ad valorem tax); *Wages v. Michelin Tire Corp.*, 233 Ga. 712, 214 S.E.2d 349 (1975), *aff'd*, 423 U.S. 276 (1976) (property taxes); *Richmond County Property Owners Ass'n v. Augusta-Richmond County Coliseum Authority*, 233 Ga. 94, 210 S.E.2d 172 (1974) (beer license and tax); *City of Lithonia v. DeKalb County Bd. of Educ.*, 231 Ga. 150, 200 S.E.2d 698 (1973) (alcoholic beverages tax); *Robbins v. City of Rome*, 230 Ga. 901, 199 S.E.2d 802 (1973) (professional license tax); *DeKalb County v. Allstate Beer, Inc.*, 229 Ga. 483, 192 S.E.2d 342 (1972) (alcoholic beverages audit fee).

There have been at least two such cases challenging the constitutionality of state income tax statutes. See *Parrish v. Employees' Retirement System*, 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied*, 111 S. Ct. 2016 (1991) (suit for declaratory and injunctive relief, contesting constitutionality of an amendment to income tax statute); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930) (suit for injunction restraining enforcement of Income Tax Act of 1929, on grounds of alleged unconstitutionality). As stated by the Georgia Supreme Court in *Chilivis v. National Distrib. Co.*, 239 Ga. 651, 654, 238 S.E.2d 431, 433 (1977), "[t]he rule that the state may not be sued without its consent is not applicable to an action where injunction

is sought to prevent the commission of an alleged wrongful act by an officer of the state acting under color of office but without lawful authority". *Accord Undercofler v. Seaboard Air Line R.R.*, 222 Ga. 822, 826-27, 152 S.E.2d 878, 882-83 (1966) (suit for injunction to restrain tax treatment allegedly contrary to state and federal constitutions was not a prohibited suit against the State).

Col. Reich also states that "Georgia courts have ruled that declaratory relief is not available where other statutory remedies have been specifically provided". Petitioner's Brief, p. 18. However, O.C.G.A. § 9-4-2(c) expressly provides that "[r]elief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies." The case of *George v. Department of Natural Resources*, 250 Ga. 491, 299 S.E.2d 556 (1983), cited on page 18 of the Petitioner's brief, stands merely for the proposition that the courts will not entertain an action for declaratory relief where to do so would disrupt an ongoing administrative proceeding. Similarly, neither *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), nor *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), supports Col. Reich's statement that "equitable relief for federal retirees . . . was absolutely prohibited . . . because there was an adequate remedy at law under the refund statute." Petitioner's Brief, p. 23.<sup>2</sup>

<sup>2</sup> Neither case concerned an effort to enjoin an allegedly unconstitutional tax statute prior to payment of the tax thereunder. In *Wright v. Forrester*, the taxpayer, who had pursued a refund claim under the predecessor of O.C.G.A. § 48-2-35, subsequently brought a mandamus action under the refund statute to compel approval of his claim. 192 Ga. at 866, 16 S.E.2d at 874.

It is also revealing that Col. Reich participated in an action for declaratory judgment and injunctive relief challenging the continued constitutionality of Georgia's tax scheme following *Davis*. See J.A. 5-9. (That lawsuit, *Avery T. Salter, et al. v. The State of Georgia, et al.*, Fulton Superior Court, Civil Action No. D-71448, was filed after Col. Reich had paid the taxes he now wants refunded. Reich Dep., Exh. 24.) Although that action was subsequently dismissed, it was not for the reasons alleged by Petitioner. See Petitioner's Brief, pp. 5, 6, and 18. When the General Assembly amended Georgia's income tax statutes, eliminating the disparate treatment of federal and state retirement benefits, the *Salter* plaintiffs' claim concerning the statutes' continued constitutionality was mooted. See generally *Waldron v. Collins*, 259 Ga. 582, 582, 385 S.E.2d 74, 74-75 (1989) ("The enactment of HB No. 1 EX has determined the future legal implications of the challenged provisions by repealing them. . . . Hence, no judicial decision is needed to determine prospectively the legality of a non-existent statute.") Clearly, Col. Reich's earlier lawsuit was "the wrong type of action[ ]" to secure a refund, and "when the Georgia General Assembly amended Georgia's income tax provisions . . . there . . . was [also] no controversy as to the present that

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The Georgia Supreme Court held merely that the refund statute did not provide for mandamus, affirming the trial court's dismissal of the complaint. In *Henderson v. Carter*, the Georgia Supreme Court affirmed the dismissal of a mandamus action seeking certain sales tax refunds because, among other reasons, the taxpayer had an adequate legal remedy under the refund statute. 229 Ga. at 880, 195 S.E.2d at 7.

would permit [an action for declaratory or injunctive relief] to lie." J.A. 45.

Petitioner complains that "declaratory relief . . . offers no assurance of a decision before the income tax is due." Petitioner's Brief, p. 19. Code Section 9-4-3(a) permits the court, "in order to maintain the status quo pending the adjudication of the questions [presented in a declaratory judgment action]", to grant interlocutory injunctive relief. If the taxpayer cannot obtain an expeditious ruling, and if the taxpayer cannot obtain at least an interlocutory injunction against enforcement of the statute alleged to be unconstitutional, when the Revenue Department issues an assessment he can appeal under O.C.G.A. §§ 48-2-59 or 50-13-12. See *infra*.

For the first time, Col. Reich argues that O.C.G.A. § 48-7-84 "stands as an absolute bar to enjoining the income tax pending a judicial determination of its illegality." Petitioner's Brief, p. 20. Whether that Code provision applies to a constitutional challenge to a tax has never been decided in Georgia, nor are Respondents aware of any instance where the State Revenue Commissioner has tried to assert it as a bar in such a situation. See generally *Parrish v. Employees' Retirement System*, 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied*, 111 S. Ct. 2016 (1991) (injunctive suit challenging the constitutionality of an amendment to income tax statute). Because Col. Reich did not even raise that provision in the Georgia courts, there was no ruling on this issue below, and Col. Reich



should be precluded from arguing this point of Georgia law now.<sup>3</sup>

## 2. Administrative appeal

A taxpayer may, within 30 days of the issuance of a deficiency assessment against him, request a hearing under Georgia's Administrative Procedure Act ("APA"). O.C.G.A. § 50-13-12. If he receives an adverse administrative decision, the aggrieved taxpayer may seek superior and appellate court review. O.C.G.A. §§ 50-13-19, -20. See *Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341 (1975); *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir.), cert. denied,

<sup>3</sup> In fact, there is authority which indicates that Code Section 48-7-84 does not apply in a situation like this, based on the Georgia courts' interpretation of O.C.G.A. § 48-3-26. Code Section 48-3-26 provides generally that "[n]o . . . judicial interference [may] be had in any levy or distress for taxes under [Georgia's tax code]". Despite this seemingly broad language, the Georgia courts have stated that injunctive relief may be given where there is "[a]n unconstitutional exaction, because what is then called a tax is no tax." *Harris Orchard Co. v. Tharpe*, 177 Ga. 547, 547, 170 S.E. 811, 811 (1933). Accord *Vincent v. Poole*, 181 Ga. 718, 184 S.E. 269 (1936). What is now O.C.G.A. § 48-7-84 was first enacted into Georgia law in 1931. See 1931 Ga. Laws Ex. Sess. 24, § 40. Six years later, in an action involving state income taxes, the Georgia Supreme Court repeated with approval "the general rule that 'injunction will lie, at the instance of any taxpayer who has not estopped himself, to enjoin a sale of his property for the collection of an unauthorized tax.'" *Carreker v. Green & Milan*, 183 Ga. 864, 864, 189 S.E. 836, 836 (1937) (quoting *Fulton Trading Co. v. Baggett*, 161 Ga. 669, 671, 131 S.E. 358, 359 (1926)) (emphasis added).

479 U.S. 884 (1986). Col. Reich complains that "jurisdiction under the APA is not triggered until the Revenue Department takes some action[, and t]he Department may choose not to issue an assessment or wait to issue an assessment." Petitioner's Brief, p. 24. In the meantime, he asserts, "the taxpayer remains exposed to criminal prosecution." *Id.* Unless this particular objection refers solely to the "risk" of criminal prosecution, which is addressed *infra*, it is difficult to fathom. If he had treated his federal retirement benefits as tax-exempt on his Georgia income tax returns for the periods in question, and the Department never issued a deficiency assessment, his position would have effectively been vindicated.

Col. Reich also argues that "jurisdiction under Georgia's APA to review a tax statute is unclear. . . . Petitioner was not aggrieved by an act of the department, but by an unconstitutional act of the legislature." See generally O.C.G.A. § 50-13-12 ("The Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes"). However, "the issuance of a final assessment by the Commissioner has been treated as an act by which a taxpayer is aggrieved[, within the meaning of Georgia's APA]." Buckland, *State Taxpayer Remedies*, 27 Mer. L. Rev. 309, 315 (1975). Accord Harrold, *A Practical Guide To State Tax Practice*, 15 Ga. St. B. J. 74, 76-77 (1978). If Col. Reich had treated his retirement benefits as tax-exempt on his Georgia returns, and a deficiency assessment had followed, Col. Reich would assuredly have been "aggrieved by an act of the department" and entitled to appeal under the APA.



Col. Reich also contests the Due Process sufficiency of an APA appeal in his situation because "[the Revenue Department does not have] authority to strike a tax statute. . . . Thus, the resort to administrative review would have been completely useless". Petitioner's Brief, p. 24. See also Brief Amici Curiae of National Association of Retired Federal Employees ("NARFE"), *et al.*, p. 14 ("Administrative review is unavailing to taxpayers challenging unconstitutional taxation because the administrative tribunal is 'powerless' to provide relief.") Without dispute, where the constitutional validity of a statute is challenged before an administrative hearing officer or board in Georgia, the officer or board is without power to declare the statute unconstitutional. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975). However, the constitutional issues may be raised before the administrative hearing officer in a tax appeal brought under O.C.G.A. § 50-13-12, and those issues will be resolved by the superior court and appellate courts on review of the agency decision. See *Georgia Real Estate Comm'n v. Burnett*, 243 Ga. 516, 255 S.E.2d 38 (1979). See generally *State Bd. of Equalization v. Trailer Train Co.*, 253 Ga. 449, 320 S.E.2d 758 (1984) (involving ad valorem tax appeals brought under O.C.G.A. § 48-2-18); *Foster v. Georgia Bd. of Chiropractic Examiners*, 257 Ga. 409, 410-11, 417-19, 359 S.E.2d 877, 878, 883-84 (1987) (deciding constitutional claim on appeal from administrative proceeding). Given the further review which is available, Col. Reich is wrong when he asserts that an APA appeal of a Revenue Department assessment against him would have been futile.

### 3. Superior court appeal

After receiving a notice of assessment, a taxpayer may choose to forego an administrative hearing, and appeal directly to the superior court. O.C.G.A. § 48-2-59. See *Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341 (1975); *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986). Petitioner does not appear to dispute that he could have excluded his federal retirement benefits from income reported on his Georgia return and appealed the resulting deficiency assessment under Code Section 48-2-59. Other than his arguments concerning the "risk" of criminal prosecution and forced collection during such an appeal – arguments which Respondents address *infra* – Col. Reich's only complaint with this predeprivation procedure seems to be with the requirement that a taxpayer who appeals must provide adequate security in case he loses. See O.C.G.A. § 48-2-59(c). Petitioner's Brief, p. 26.<sup>4</sup>

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<sup>4</sup> During his discussion of superior court appeals, Petitioner also states that "no assessment is required to begin collection" of the unpaid amount shown on Petitioner's 1988 Georgia income tax return. He also says that "the Commissioner could enter an execution [for that amount] which would impose a lien" on Petitioner's property. *Id.* at 26. It is not clear what point Col. Reich is trying to make. Col. Reich's 1988 return itself treated his federal retirement benefits as taxable and reflected an amount due, which he simply refused to pay. (Reich Dep., Exh. 17 and 25.) If Petitioner had reported his federal retirement benefits as tax-exempt, the Department would have had to issue a deficiency assessment to pursue the matter further, and Petitioner would have been entitled to appeal. (It is undisputed that the Revenue Department, other than sending certain initial notices, has not in fact attempted to collect any additional taxes from Col. Reich for 1988.)

Col. Reich's argument was rejected by the Court over one hundred years ago. In *McMillen v. Anderson*, 95 U.S. 37 (1877), the taxpayer argued that a statute which permitted the collection of disputed taxes to be enjoined was insufficient for Due Process purposes because the statute required that a bond be posted for double the amount at issue. "[I]t is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue." *Id.* at 42. This assertion gave the Court but little pause:

It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another.

*Id.* See generally *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue").

In *Ownbey v. Morgan*, 256 U.S. 94 (1921), this Court rejected the argument that Due Process was violated by a state statute which required the defendant in a foreign attachment case to provide security before the defendant could appear and contest the merits of the plaintiff's demand.

It is said the essential element of due process – the right to appear and be heard in defense of the action – is lacking. But the statute in plain terms gives to defendant the opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process.

*Id.* at 102-103. The Court held that the bond requirement did not deny the defendant's Due Process rights, observing that "[t]he due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall." *Id.* at 110-11. See generally *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 553 (1949) ("A state may [generally] set the terms on which it will permit litigations in its courts[, without thereby offending Due Process]. . . . [I]t is [normally] within the power of a state to close its courts to . . . litigation if the condition of reasonable security is not met.")

Finally, NARFE states that "[b]ecause the bond requirement is simply a deprivation of a different order, judicial review of [an assessment] is not a *predeprivation* remedy." Brief of Amici Curiae NARFE, *et al.*, p. 8 n.5 (emphasis in original). It is clear that NARFE misunderstands what is really meant by *McKesson's* use of the terms "predeprivation" and "post-deprivation". An appeal under Code Section 48-2-59 is "predeprivation"



because the taxpayer obtains a decision on the constitutionality of the tax prior to having to pay, and because the taxpayer does not have to pay those amounts if he wins. Such an appeal is not "post-deprivation" just because the taxpayer may have certain expenses, such as the cost of a surety bond, attorney's fees, filing fees, etc., if he wants to initiate such an action.

#### 4. Affidavit of illegality

If the taxpayer has chosen not to pursue any other predeprivation remedy, and faces a Revenue Department writ of execution for the disputed taxes, an "affidavit of illegality" is available to stop any actual collection efforts. O.C.G.A. § 48-3-1. The only real objection which Col. Reich seems to have with the Due Process adequacy of this predeprivation procedure is the requirement that the taxpayer give "good and solvent bond" for the amount at issue. See Petitioner's Brief, p. 26 n.18. That objection is disposed of by the authorities cited *supra*.

#### B. Petitioner Was Not Subject To "Constitutionally Significant" Duress Forcing Him To Forego A Predeprivation Challenge

In addition to his other objections to each of Georgia's predeprivation tax procedures, Col. Reich argues that he was subject to "constitutionally significant" duress which forced him to forego a predeprivation challenge and pay the disputed taxes rather than contest them. See Harper, 113 S. Ct. at 2519 n.10. For purposes of determining whether "constitutionally significant" duress

existed, however, Col. Reich and supporting amici propose a rigid standard which is incompatible with Due Process principles. "Due process, as this Court often has said, is a flexible concept that varies with the particular situation." *Zinerman v. Burch*, 494 U.S. 113, 127 (1990). "[T]he nature of the procedure required to comply with the due process clause depends on many factors concerning the individual deprivation." Rotunda & Nowak, *Treatise On Constitutional Law: Substance and Procedure*, § 17.7, p. 643 (2nd ed. 1992). In *Mathews v. Eldridge*, 424 U.S. 319 (1976) this Court stated that the following factors should properly be taken into account in determining the type of "due process" required in particular situations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. at 335.

This Court has long recognized the essential role that taxes play in the lives of the states and their citizens. See *Springer v. United States*, 102 U.S. 586, 594 (1880) ("The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of the government"); *Dows v. Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to



obtain the means to carry on their respective governments.") As a consequence,

[although] "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,' " *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult.

*McKesson*, 496 U.S. at 37 (emphasis in original and footnote omitted).

This Court has properly given the "government's exceedingly strong interest in financial stability", *id.*, great weight in determining that Due Process does not require a state to provide taxpayers with any predeprivation process *at all*. Nevertheless, Col. Reich and supporting amici assert that this same interest should be virtually disregarded when evaluating the Due Process adequacy of the predeprivation tax procedures which *were* available to Col. Reich in Georgia. Amicus Committee On State Taxation ("COST") acknowledges that "[t]he Due Process Clause embodies . . . principles of . . . balancing of interests (the State's and the individual's)". Amicus Brief of COST, p. 3. COST also agrees that "[i]n the context of state taxes, the [State] interests to be balanced include the

orderly administration of revenue laws . . . [and] the conservation of the public fisc". *Id.* at 6. What emerges from the arguments made by Col. Reich and his amici, however, is an inflexible Due Process test which gives little or no consideration to the State's legitimate financial concerns.

NARFE is the most forthright in articulating the rigid Due Process test which Col. Reich and his supporters want this Court to adopt. In NARFE's view, no predeprivation tax procedure satisfies Due Process unless a taxpayer who pursues a pre-payment challenge to his liability is guaranteed that he will have to pay only the principal tax itself and "market" interest if he loses – even, assumedly, if he has asserted frivolous claims or disputed his liability in bad faith. See Brief Amici Curiae of NARFE, *et al.*, p. 13. This "test" does not take into account the State's legitimate financial interest in seeing that taxes which are legally owed are promptly paid; it ignores this interest. This standard cannot be gleaned from *McKesson* or the cases upon which *McKesson* relied. "*McKesson* did not resolve . . . the degree or nature of penalties and sanctions required to conclude that the state has not provided sufficient pre-deprivation procedures." Ervin & Giddings, *Supreme Court Distinguishes Remedy and Retroactivity Issues Affecting State Taxes*, 73 J. Tax'n 296, 302 (1990) (emphasis added). Clearly, the mere possibility that a taxpayer *may*, under certain circumstances, be subject to *some* penalty or sanction cannot be the test for measuring the existence of "constitutionally significant" duress.

To date, this Court has found "duress" only where payment has been tendered to avoid severe sanctions

which were immediate or self-operative. As stated by the Court in *Railroad Co. v. Commissioners*, 98 U.S. 541 (1878):

[w]here a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an *immediate* and *urgent necessity* therefor, or unless to release his person or property from detention, or to prevent an *immediate* seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back.

*Id.* at 543-44 (emphasis added). Accord *United States v. New York & Cuba Mail Steamship Co.*, 200 U.S. 488, 494 (1906). "Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods." *Garr, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912). On the other hand, the "self-executing" provisions of "[a]n act which declares that where the . . . tax is not paid . . . a penalty of twenty-five per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operate[ ] . . . as duress." *Id.* at 471 (emphasis added). Payment under these circumstances "to avoid the disruption of . . . business" would be payment under "duress". *Id.* at 472.

Whether penalties for nonpayment are "immediate" or "self-executing" looks to the *likelihood* that penalties will actually be incurred if payment is not made. The *degree* of the penalties or sanctions faced by the non-paying taxpayer is also important, because even a mandatory penalty should not necessarily be regarded as "constitutionally significant" duress, if the penalty, for

example, is modest. "The [implied duress] doctrine is based on the concept that the penalty exacted for nonpayment of a tax may be *so severe* that it constitutes coercion and duress." *Private Truck Council of America v. New Hampshire*, 517 A.2d 1150, 1156 (N.H. 1986) (emphasis added). Accordingly, this Court has found constitutionally significant duress only in extreme circumstances: for example, where non-payment of a disputed fee would have invalidated a company's bonds, see *Union Pacific Railroad Co. v. Public Service Comm'n*, 248 U.S. 67 (1918); where non-payment would have forfeited the right to do business, see *Garr, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); and where non-payment would have forfeited the right to do business and raised serious questions regarding the validity of the taxpayer's business contracts, see *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280 (1912).

The availability of a predeprivation tax procedure must also be considered in deciding whether "constitutionally significant" duress is present. As stated by the New Hampshire Supreme Court:

We would have no trouble accepting the plaintiffs' argument [concerning duress] had the plaintiffs' only choices been either payment of the tax or submitting to the penalties imposed upon conviction of a misdemeanor. Simple alternatives, however, were open to the plaintiffs. [T]he plaintiffs could have filed a declaratory judgment action [contesting the constitutionality of the tax].

*Private Truck Council of America v. New Hampshire*, 517 A.2d 1150, 1156 (N.H. 1986).



Georgia's predeprivation tax procedures distinguish this case from *McKesson*. In *McKesson*, the Court observed that "Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida *requires* the taxpayers to raise their objections to the tax in a post-deprivation refund action." 496 U.S. at 38 (footnote omitted and emphasis added). As later stated by counsel who represented *McKesson*, "[t]he Court . . . held that a 'tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure' when a tax *must* be paid to avoid economic sanctions or the seizure of the taxpayer's property." Hellerstein, *Preliminary Reflections On McKesson And American Trucking Associations*, 48 Tax Notes 325, 327 (1990) (quoting *McKesson*, 496 U.S. at 38) (emphasis added).

Amicus NARFE is wrong when it asserts categorically that "[a] taxpayer is subject to 'constitutionally significant duress' when[ever] the state imposes penalties on him if he mounts an unsuccessful challenge to the validity of his taxes", citing *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280 (1912). Brief Amici Curiae of NARFE, *et al.*, p. 11. In *Atchison* Justice Holmes suggested that "if . . . the citizen is put at a *serious disadvantage* in the assertion of his legal . . . rights, by defence in the suit, justice *may* require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side." *Id.* at 286 (emphasis added). However, the statutes in *Atchison* provided that failure to pay the tax in question would forfeit a corporation's right to do business in the state. *Id.* at 286.

Because third parties would have been understandably reluctant to enter into contracts or otherwise do business with a company whose franchise was under such a cloud, nonpayment of the tax would have immediately and seriously affected the taxpayer's operations. *Atchison* is therefore properly read as yet another case in which the taxpayer, had it elected not to pay, faced an immediate and serious loss.

Properly read, this Court's decisions lead to the following conclusion: because the Petitioner had predeprivation tax procedures available to him, he was not subject to "constitutionally significant" duress unless – because of the likelihood and severity of a penalty or sanction for non-payment – he had no real choice but to forego such a pre-payment challenge and pay the tax. See *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 n.11 (1973) (taxpayers had "no choice except to pay the [amounts at issue] or else to cease dispensing alcoholic beverages altogether – that is, to discontinue an entire line of business. Obviously, this was *no choice at all.*") (emphasis added). See also *Swift Co. v. United States*, 111 U.S. 22, 28-29 (1884) ("The [taxpayer] had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business.") See generally *Ward v. Love County*, 253 U.S. 17, 23 (1920) ("by threatening to sell the lands of [the taxpayers] and actually selling other lands similarly situated[, county officials] made it appear . . . that they must choose between paying the taxes and losing their lands."); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986) ("*mandatory penalties incurred because a party has chosen to seek judicial review are unconstitutional where 'the penalties for disobedience are by fines so*



*enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation' ") (emphasis added); Ford Motor Co. v. Coleman, 402 F. Supp. 475, 484 (D.D.C. 1975) ("[T]he Constitution [does not] dictate[] risk-free litigation. . . . [T]he Constitution is offended when [a] penalty system is of such a nature as to create a virtual roadblock to judicial review.") (emphasis added).*

Col. Reich does not contend that he was subjected to actual duress to pay the disputed amounts prior to challenging their legality. The record is clear that the taxpayer was never threatened with levy, attachment, garnishment, or other sanctions if he did not pay the taxes whose refund he now seeks. (Reich Dep., pp. 40, 41, and 49). Georgia's statutory provisions concerning the non-payment of taxes are all reasonable measures designed to see that taxes are paid if they are legally owed. Such provisions did not leave Petitioner with "no choice" but to forego a predeprivation challenge and pay the disputed taxes on his federal retirement benefits. The particular provisions to which Petitioner objects are addressed below.

### 1. Georgia's failure-to-pay penalty

Col. Reich complains that if he had used one of Georgia's predeprivation procedures to challenge the tax on his federal retirement benefits and lost, he might have had to pay a failure-to-pay penalty. See O.C.G.A. § 48-7-86(a)(1)(B). Of course, the taxpayer who prevails in such a contest is subject to no penalty whatsoever. Moreover, this penalty – which equals one-half of 1 percent per

month, up to a maximum of 25% – may not be imposed "when . . . the failure is due to reasonable cause and not due to willful neglect." O.C.G.A. § 48-7-86(a)(2). "[Tax] penalties [in Georgia] are not favored, and a statute imposing [such] a penalty must be strictly construed." *State Revenue Comm'n v. National Biscuit Co.*, 179 Ga. 90, 103, 175 S.E. 368, 374 (1934). Consequently, the failure-to-pay penalty cannot properly be assessed against a taxpayer who has a good faith, reasonable basis for contesting his liability under an accepted pre-payment procedure.<sup>5</sup>

The State of Georgia has a legitimate interest in seeing that taxpayers promptly pay taxes which are legally due. Hence, there should be no Due Process problem with a pre-payment procedure which does not preclude a civil penalty, not exceeding 25%, if the taxpayer using that procedure to challenge his taxes does not have a good faith, reasonable basis for his refusal to pay. Georgia's failure-to-pay penalty did not leave Col. Reich with "no choice" but to forego a predeprivation challenge and pay instead. See generally *Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964) ("It is urged that the penalties of contempt risked by a refusal to comply with [IRS] summonses are so severe that the statutory procedure [for contesting

<sup>5</sup> Because he was assessed a failure-to-pay penalty on his unpaid 1988 taxes, Col. Reich suggests that the Georgia Department of Revenue will in fact assess the failure-to-pay penalty against any taxpayer. Petitioner's Brief, pp. 15-16. However, Col. Reich did not initiate a proper predeprivation challenge to his 1988 liabilities. He reported his federal retirement benefits as taxable on his return, and then refused to pay the amount reflected on the return as due. (Reich Dep., Exh. 17 and 25.)

such a summons] amounts to a denial of judicial review. . . . It is sufficient to say that noncompliance is not subject to prosecution thereunder when the summons is attacked in good faith."); *Wagner Electric Corp. v. Thomas*, 612 F. Supp. 736, 743 (D. Kan. 1985) ("even though a penalty might discourage a party from seeking judicial review, that penalty [can] be enforced against a party [who lacks] an objectively good faith challenge"). This Court has never found that a penalty like Georgia's failure-to-pay penalty would alone amount to "constitutionally significant" duress, and there is no reason to so hold in this case.

## 2. The accrual of interest

The taxpayer also asserts that Georgia's predeprivation remedies do not satisfy Due Process because a taxpayer has to pay interest if he loses. Petitioner's Brief, pp. 14-16. "[I]nterest [is merely] a means of compensation", *United States v. Childs*, 266 U.S. 304, 307 (1924), designed to insure that a state involved in litigation with a taxpayer who has not paid the disputed liability does not lose the time-value of any amounts eventually found to be due. It makes no sense to maintain that a predeprivation remedy violates Due Process unless a losing taxpayer is never subject to interest. This standard is in no way suggested by a fair reading of *McKesson* or any other case, and Respondents know of no pre-payment remedy anywhere which meets such a test.

Perhaps in recognition of this fact, Amicus NARFE asserts that the taxpayer must be guaranteed that he will be subject to no more than "market" interest if he contests

his liability prior to payment and loses. Brief Amici Curiae of NARFE, *et al.*, pp. 12, 13, and 15. Of course, NARFE nowhere clearly indicates how it would measure "market" interest for these purposes. Some consumers may presently be paying as much as 18% annual interest on their credit cards, far more than Georgia's 12% interest rate on unpaid taxes. See O.C.G.A. § 48-2-40. NARFE does not say why the State of Georgia should be constitutionally compelled to lend money out at better terms than commercial lenders. Nor does NARFE say when the difference between the interest charged and the presumed "market" rate would be of constitutional moment. For example, the interest rate charged on federal income tax underpayments is based on the average market yield on outstanding U.S. marketable obligations with remaining maturity periods of three years or less, *plus* 3 percentage points. 26 U.S.C. §§ 6621(a)(2) and 1274(d)(1)(C)(i). Under certain circumstances, large corporate underpayments of federal tax accrue interest equal to the average market yield of such obligations, *plus* 5 percentage points. 26 U.S.C. § 6621(c).

Petitioner was not, in any constitutional sense, compelled to forego a predeprivation challenge to his liability simply because interest would be payable on any deficiency which might be found to be due. The mere possibility of interest is wholly unlike those sanctions and penalties which the Court has in the past treated as "constitutionally significant" duress. The argument concerning "market" interest was never presented in the courts below, and it has not been adequately developed by the Petitioner or his supporting amici here. That argument should therefore be ignored.



### 3. The "risk" of criminal prosecution

Col. Reich argues that Georgia's predeprivation remedies do not satisfy Due Process because "not paying the contested tax *always* creates the risk that *some* prosecutor will pursue criminal prosecution." Petitioner's Brief, p. 14 (emphasis added). He therefore asserts that "the only way to avoid this risk is to pay the tax." *Id.* at 12. In fact, Col. Reich suggests that the State Revenue Commissioner is obligated to prosecute criminally any taxpayer who has used an accepted method to pursue a reasonable, good faith predeprivation challenge to his tax liability. *Id.* It is uncontested that Col. Reich was never so much as threatened with prosecution.

The taxpayer's contention regarding criminal prosecution is untenable. Col. Reich cites no authority for the proposition that a taxpayer who has used an accepted method to assert a reasonable, good faith predeprivation challenge to his taxes is properly subject to criminal prosecution in Georgia. That would be an astonishing proposition, for the purpose of Georgia's predeprivation procedures is to permit just such challenges. The mere possibility that some state official, acting unreasonably or in bad faith, could conceivably try to prosecute under such circumstances did not subject Col. Reich to "constitutionally significant" duress forcing him to forego any predeprivation challenge. *Cf. Marchetti v. United States*, 390 U.S. 39, 53 (1968) (person invoking Fifth Amendment privilege against self-incrimination must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards" of criminal prosecution.) The Commissioner is unaware of any jurisdiction which does not have

appropriate criminal sanctions for taxpayers who willfully refuse to pay taxes they lawfully owe. *See, e.g.*, 26 U.S.C. § 7203. Simply put, Col. Reich believes that no predeprivation remedy satisfies Due Process, and that the *McKesson* inquiry is actually meaningless.

In addition, Col. Reich could not under any circumstances have been prosecuted under Code Section 48-7-2(a)(1), one of the two criminal statutes to which he refers. *See* Petitioner's Brief, pp. 11-12. While Code Section 48-7-2 provides that it is a misdemeanor "for any person who is required to pay any tax . . . imposed by [the income tax provisions of the Revenue Code] to fail to . . . [p]ay the tax", this portion of the statute was declared unconstitutional prior to the date on which Col. Reich would have been required to file his return for 1985, the first tax year at issue in this case. *See State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985). The taxpayer argues that in *Higgins* the Georgia Supreme Court declared unconstitutional and severed from the statute only that portion permitting imprisonment upon conviction and "left standing the alternative punishment of a criminal fine". Petitioner's Brief, p. 11. In fact, when the Georgia Supreme Court found that Code Section 48-7-2(a)(1) unconstitutionally permitted "imprisonment for debt", the court invalidated the provision in its entirety, sustained the defendant's demurrer to the accusation, and ended the prosecution before the question of actual sentencing could even be reached. The court did not uphold the Code section to the extent that fines alone



might be imposed, nor did the court have the authority to do so.<sup>6</sup>

In this case Col. Reich's actions speak far louder than his words. Col. Reich argues vehemently that Georgia's criminal tax statutes placed him under "constitutionally significant" duress to pay his liabilities before challenging their validity. He contends that no taxpayer in Georgia can reasonably be expected to risk even the possibility of prosecution by using one of Georgia's recognized predeprivation tax procedures to dispute his taxes prior to payment. He maintains that "[b]ecause [he] refused to pay 1988 income taxes after *Davis*, Petitioner [still] face[s] the risk of criminal prosecution, the stigma and record of a conviction, and a fine of \$1,000 for . . . nonpayment." Petitioner's Brief, p. 12. What is clear, however, is that when Col. Reich saw after *Davis* that there was a legitimate reason to question the validity of Georgia's tax treatment of his military retirement benefits, he did not

<sup>6</sup> One salient feature of a criminal statute is that "imprisonment or the imposition of a fine or both may follow a conviction." *Williams v. State*, 138 Ga. App. 662, 663, 226 S.E.2d 816, 818 (1976). *Accord State v. Steele*, 112 Ga. 39, 42, 37 S.E. 174, 175 (1900) ("No proceeding . . . has ever been held to be a criminal case unless the judgment rendered might in some contingency result in the loss of liberty"). "Where one portion of a statute is constitutional, [the Georgia Supreme Court] has the power to sever that portion . . . and preserve the remainder if the remaining portion of the Act accomplishes the purpose the legislature intended." *Nixon v. State*, 256 Ga. 261, 264, 347 S.E.2d 592, 594 (1986) (emphasis added). The Georgia Supreme Court could not transform Code Section 48-7-2(a)(1) from the criminal provision intended by the Georgia legislature into a civil penalty, and *Higgins* does not purport to have done so.

hesitate to refuse to pay any further tax on those benefits. The supposed "duress" created by Georgia's criminal tax provisions can hardly be regarded as "constitutionally significant" if taxpayers like Col. Reich feel free to withhold payment when they have a reasonable, good faith belief that they do not owe the tax.

#### 4. Liens and forced collection action

On pages 16-17 of his brief, Petitioner says he was compelled to forego a predeprivation challenge because of the possibility that liens would be placed on his property for the disputed taxes. Filing of an income tax execution on the general execution docket is required to establish the State's priority position vis-a-vis certain other creditors. O.C.G.A. § 48-2-56(e). However, "[n]either a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods." *Garr, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912).

Col. Reich's claims regarding *actual* collection are too attenuated to have left him with "no choice" but to pay rather than dispute his liabilities. Revenue Department garnishments generally proceed "as provided by law regarding garnishments in other cases when judgment has been obtained or execution issued." O.C.G.A. § 48-2-55(b)(2). Consequently, if "the court finds that the defendant has attacked the validity of the [assessment] upon which the garnishment is based in an appropriate forum, the judge may order the garnishment released and

stayed until the validity of the [assessment] has been determined in such forum." O.C.G.A. § 18-4-65(b).

Col. Reich cites absolutely no authority for his claim that the Revenue Department may actually levy on or attach property of a person whose tax liability is properly in court pursuant to an appeal under O.C.G.A. § 48-2-59. The requirement in Code Section 48-2-59(c) that a taxpayer provide "a surety bond or other security. . . . to pay any tax . . . which is found to be due by a final judgment of the court" is to preclude the need for collection of the disputed liability during the litigation. "Even though the filing of an appeal [under Georgia's APA, O.C.G.A. § 50-13-12] does not technically prohibit the Revenue Department from proceeding to collect on the assessment", as a matter of practice, forced sales are not normally made until the matter is finalized. Harrold, *A Practical Guide To State Tax Practice*, 15 Ga. St. B. J. 74, 77 (1978). Moreover, the APA expressly provides a means for staying enforcement of a tax assessment pending a final ruling in any action brought under O.C.G.A. § 50-13-12. See O.C.G.A. §§ 50-13-12(c), -19. An action for declaratory and injunctive relief necessarily contemplates a stay of enforcement, as does an "affidavit of illegality" under Code Section 48-3-1.

## II. PETITIONER'S ARGUMENTS CONCERNING THE DUE PROCESS ADEQUACY OF GEORGIA'S PREDEPRIVATION TAX PROCEDURES DEPEND SUBSTANTIALLY ON THE ARGUMENT WHICH THIS COURT REFUSED TO ACCEPT FOR REVIEW

In significant part, Col. Reich's arguments concerning the Due Process adequacy of Georgia's predeprivation tax procedures return to the argument that this Court

refused to accept for review: that is, the assertion that Col. Reich's Due Process rights were violated because the Georgia Supreme Court construed the refund statute to be inapplicable to taxes paid under a law later held unconstitutional. See *Petition for Certiorari*, pp. 19-25; *Brief In Opposition To Petition For Certiorari*, pp. 23-27. According to Col. Reich, "Georgia's overall remedial scheme was unclear and uncertain because Georgia provided a clear and certain predeprivation [sic] remedy in the refund statute, but Georgia later eliminated this remedy after the time for other relief had expired." *Petitioner's Brief*, p. 10. Amici supporting Col. Reich echo this theme. COST protests that "[b]ait and switch" tax challenge schemes and remedial 'shell games' *ipso facto* violate both the spirit and substantive principles of Due Process. . . . [T]he Georgia Supreme Court's behavior in the current case [is] an egregious example of a '[fiscal] ends justifies the means' jurisprudence. . . ." *Amicus Brief of COST*, pp. 8-9. The Tax Executives Institute ("TEI") complains that

[the Georgia Supreme Court] parsed the Georgia refund statute, and studied the other provisions of the Georgia Code, not in search of principle or justice, but for a loophole. It sought not to implement the Court's mandate in *Beam*, *Davis* and *Harper*, but to obliterate it. That the court below's action might pass muster under federal due process principles truly beggars the imagination.

*Amicus Brief of TEI*, p. 16.

Col. Reich and his amici continue to revisit the Georgia Supreme Court's interpretation of O.C.G.A. § 48-2-35



– despite this Court’s refusal to accept for review Col. Reich’s Due Process argument concerning that issue – because they do not want to believe that a taxpayer can ever properly be denied a refund of taxes paid under a statute later held unconstitutional, except perhaps for failure to comply with a refund statute’s procedural requirements. Hence, they cannot willingly accept any result in this case other than full refunds. Due Process is the vehicle which they hope to use to achieve this result, but Due Process – at least not Due Process as presently viewed by the Court – is not their real concern. If it were, they would pay closer attention to this Court’s holding in *Harper*, where the Court stated that “federal law does not necessarily entitle [federal retirees] to a refund” of amounts paid on their benefits for years before 1989 under income tax statutes invalidated by *Davis*, 113 S. Ct. at 2519. “Rather, the Constitution requires [a state simply] ‘to provide relief consistent with federal due process principles.’ ” *Id.* at 2519 (quoting *American Trucking Assns v. Smith*, 496 U.S. 167, 181 (1990) (plurality opinion)). “[I]n order to satisfy the commands of the Due Process Clause[, the] State may choose to provide a form of ‘predeprivation process’ ”. *McKesson*, 496 U.S. at 36.

Despite these clear pronouncements from the Court, COST asserts that “[n]othing could be more violative of the concept of fairness than to permit a State to retain revenues from a tax that it should not have imposed or collected in the first place.” Amicus Brief of COST, p. 7. According to the Tax Executives Institute, “[t]his basic truth – that the States have funds properly belonging to the taxpayers – should impel reversal of the court below and a judgment ordering that a refund be made to the

petitioner.” Amicus Brief of TEI, p. 8. Unless this Court re-writes its Due Process jurisprudence to date, and retracts its statement in *Harper* that “federal law does not necessarily entitle [federal retirees] to a refund”, these arguments must be rejected.

### III. THE ARGUMENTS OF AMICUS JAMES B. BEAM CO. LACK MERIT AND RELATE PRIMARILY TO BEAM’S OWN CASE

Amicus James B. Beam Distilling Co. primarily argues the “merits” of its own lawsuit.<sup>7</sup> Not only does Beam mischaracterize the background, statutes, and decisions in the *Beam* litigation, but as shown by Georgia’s “Op. Cert. Brief” in *Beam*, Beam’s lack of standing under § 48-2-35 to obtain a refund of taxes which its wholesalers paid to Beam to satisfy their own tax liability bars a refund in Beam’s case, regardless of the outcome of the instant case.<sup>8</sup> See *Beam Op. Cert. Br.* (U.S. S. Ct. Case No.

<sup>7</sup> *James B. Beam Distilling Co. v. State of Georgia*, 263 Ga. 609, 437 S.E.2d 782 (1993), petition for cert. filed, 62 U.S.L.W. 3503 (1994) (U.S. S. Ct. Case No. 93-1140) (hereinafter “Beam” when referring to the company and “Beam” when referring to Beam’s litigation).

<sup>8</sup> The instant *Reich* case is not a companion case with *Beam* and will not resolve the *Beam* case, with its lack of standing aspect, alcohol regulatory system, dollar amounts, etc. Indeed, contrary to Beam’s argument in its amicus brief that this Court’s only proper option is to enter judgment for Beam for double the amount of distilled spirits taxes paid at a discriminatory rate, in the Georgia Supreme Court Beam argued, alternatively to its main position, that the favored manufacturers could be assessed at the higher tax rate or that Beam’s wholesalers recover a refund through Beam. Appellant’s Briefs in S93A1217 at 12-13,



93-1140), pp. 1-16, lodged by Respondents in the instant case for the Court's convenience. Also, in *Beam*, Georgia has additional reliance interests and equitable considerations, and the mandate of this Court in *Beam* expressly dictated that matters of such type were to be considered on remand. *Id.* at 16-19; *Beam*, 111 S. Ct. at 2448 (individual equities, procedural requirements and procedural bars, as well as reliance interests, may properly be considered in resolving remedial issues on remand). *Beam*'s implied duress arguments under Georgia's alcohol system are irrelevant to this case, and erroneous.<sup>9</sup>

While alcohol taxpayers have other remedies, there is some overlap in Georgia's predeprivation remedies for alcohol taxpayers and income taxpayers. *See Beam Op. Cert. Brief* (No. 93-1140), pp. 21-24. However, *Beam*, like

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26, and S93A1218 at 13, 16. Those arguments were not reached by the Georgia courts.

<sup>9</sup> Under former O.C.G.A. § 3-4-61(a)(2) (providing that liquor tax stamps were to be affixed by the manufacturer or wholesaler prior to the retail tier), the delivery by a manufacturer of distilled spirits to its Georgia wholesaler without tax stamps affixed (even before stamps were eliminated in 1993) was not a crime, not contraband, nor a ground to revoke any liquor license. *Beam*, R. (S93A1217) 120-21. *See also Beam Op. Cert. Brief* (No. 93-1140), pp. 4-19, 24-28. None of the forms of duress alleged by *Beam* solely for alcohol taxpayers exists. *Id.* — and as a reply brief on the merits in *Beam* would further show.

Also, *Beam*'s assertions concerning Georgia's 1985 liquor tax laws are inaccurate and irrelevant even to the *Beam* case itself, which involves only the 1938 version of Georgia's liquor tax, and appear more related to *Beam*'s later, pending suits with other plaintiffs to invalidate the 1985 statute. *E.g., Age Int'l, Inc. v. Georgia*, Superior Court of Fulton County, Georgia, Civil Action No. E-3793, filed July 10, 1992.

Col. Reich, errs in asserting that a suit for declaratory judgment or to enjoin an unconstitutional tax is barred in Georgia by sovereign immunity. *See, e.g., Chilivis v. National Distrib. Co., supra; Undercofler v. Seaboard Air Line R.R., supra.* Also, *Beam*'s amicus brief essentially makes a *Brinkerhoff* argument, based upon a portion of the Georgia Supreme Court's decision in *Reich I*. That argument is not only without merit in itself, *see, e.g., Beam Op. Cert. Brief* (No. 93-1140), pp. 24-29, but certiorari was not granted by this Court on that issue.

Since the *Reich* and *Beam* cases are distinct, and since Georgia has a full rebuttal to each of *Beam*'s assertions, the Court should resolve *Beam* separately from the instant case, either by denying certiorari or by allowing the State to file a reply brief therein prior to any disposition on the merits of *Beam*.

#### IV. EVEN IF GEORGIA'S PREDEPRIVATION TAX PROCEDURES DID NOT SATISFY DUE PROCESS, PETITIONER IS NOT ENTITLED TO A JUDGMENT DIRECTING THAT REFUNDS BE PAID

Even if Georgia's predeprivation tax procedures did not satisfy Due Process, there are at least two distinct reasons why Petitioner should not be given a judgment directing that refunds be paid. Sovereign immunity, and the State's reliance interests and other equitable considerations, preclude the recovery sought by Col. Reich.

**A. Sovereign Immunity Precludes An Award Of Money Damages Against The State In This Case**

Under Georgia's doctrine of sovereign immunity, a suit cannot be maintained against the State without its consent. *Irwin v. Woodliff*, 125 Ga. App. 214, 216, 186 S.E.2d 792, 794 (1971); *National Distrib. Co. v. Oxford*, 103 Ga. App. 72, 73, 118 S.E.2d 274, 275 (1961). See Ga. Const. of 1983, Art. I, Sec. II, Para. IX. Although the income tax refund statute, O.C.G.A. § 48-2-35, provides a limited waiver of the State's sovereign immunity, *Henderson v. Carter*, 229 Ga. 876, 879, 195 S.E.2d 4, 6 (1972), the Georgia Supreme Court determined in *Reich I* that this section does not apply to taxes paid under a statute later held unconstitutional. Petitioner apparently believes that if Georgia's predeprivation tax procedures did not satisfy Due Process, then he has a federal cause of action directly under the Fourteenth Amendment for refunds, notwithstanding the State's sovereign immunity. This belief is incorrect. See Brief Amici Curiae of National Governors' Conference, *et al.*, pp. 5-16. The Court should either hold that sovereign immunity precludes the refunds sought by Petitioner, or permit the Georgia courts to consider the issue on remand.

**B. The State's Reliance Interests And Other Equitable Considerations Preclude The Recovery Sought By The Taxpayer Here**

Even without regard to sovereign immunity, Col. Reich is not entitled to refunds if Georgia's predeprivation tax procedures are found to have been insufficient

for Due Process purposes. *McKesson* addresses only a state's Due Process obligation to return taxes collected under a statute which the state, from the date of enactment, knew or should have known was unconstitutional. As the Court observed in *McKesson*, "[t]he [challenged] Liquor Tax reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). . . . The State can hardly claim surprise at the Florida courts' invalidation of the scheme." 496 U.S. at 46. See also Hellerstein, *Preliminary Reflections On McKesson and American Trucking Associations*, 48 Tax Notes 325, 325 (1990) (*McKesson* held that "a taxpayer who is compelled to pay a tax that is later held to be unconstitutional under established Commerce Clause principles is entitled to meaningful retrospective relief.") By contrast, Georgia's tax treatment of federal retirees was not patently unconstitutional prior to *Davis*. See *Harper*, 113 S. Ct. at 2538 ("The circumstances in *McKesson* were quite different than those here. In *McKesson*, the tax imposed was patently unconstitutional.") (O'Connor, J., dissenting).

Georgia's reasonable reliance interests and other equitable considerations form a basis in their own right for denying the recovery sought by Col. Reich in this case. The majority opinion in *Harper* concluded that *Davis* applied retroactively, as a federal choice-of-law matter, because the rule of law announced in *Davis* was applied to Mr. Davis himself. "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review



and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 113 S. Ct. at 2517. This retroactivity rule derived from the Supreme Court's earlier decision in *Beam*, where the Court then went on to observe that "[n]othing [in a situation like this] deprives [the State] of [its] opportunity to . . . demonstrate reliance interests entitled to consideration in determining the nature of the *remedy* that must be provided." *Beam*, 111 S. Ct. at 2448 (emphasis added).

Even before *Beam*, Justice Harlan recognized that:

[reliance and other equitable considerations should be taken] into account in the determination of what *relief* is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds himself able to avoid a once-valid contract under new notions of public policy.

*United States v. Estate of Donnelley*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) (emphasis added). *Accord Lemon v. Kurtzman*, 411 U.S. 192, 198-99 (1973) (noting that state officials, and those with whom they deal, are entitled to rely on a presumptively valid state statute, and deciding remedial issues based on the state's reliance interests).

In *American Trucking Assns v. Smith*, 496 U.S. 167 (1990) ("ATA"), the plurality asserted that "[t]he determination whether a constitutional decision of [the U.S.

Supreme Court] is retroactive – that is, whether the decision applies to conduct or events that occurred before the date of the decision – is a matter of federal law," governed by the *Chevron Oil* test. *Id.* at 177. The dissent in *ATA* argued that "[c]lose examination of *Chevron Oil* and its progeny reveals that those cases establish a *remedial* principle. . . . The civil cases upon which *Chevron Oil* relied . . . are all *remedy* cases in which, as Justice Harlan explained, consideration of reliance might be appropriate." *Id.* at 219-20, 223 (Stevens, J., dissenting) (emphasis added).

It is now clear that – whatever the precise standard by which to measure the retroactivity of this Court decisions as a federal choice-of-law matter – the reliance interests and equities of the parties may be used to determine the proper *remedy* when a state statute is invalidated on federal constitutional grounds. *See, e.g., Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733 (1991) (equities, including novelty and hardship, should guide the determination of remedy, rather than the choice-of-law). After reviewing the Supreme Court's decisions in this area, Justice O'Connor concluded in *Harper* that "Justice Stevens' view [in *ATA*] has [apparently] prevailed". *Harper*, 113 S. Ct. at 2537 (dissenting opinion). As a consequence, "state and federal courts still retain the ability to exercise their 'equitable discretion' in formulating appropriate *relief* on a federal claim." *Id.* (emphasis added).

Georgia's basic statutory scheme invalidated by *Davis* had been in effect since the 1940's. *See* 1943 Ga. Laws 640, 668, § 10 (establishing income tax exemption for retirement benefits from Teachers Retirement System

of Georgia). In addition, "how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to . . . revenue statutes [like Georgia's] was anything but clearly established prior to *Davis*." *Swanson v. Powers*, 937 F.2d 965, 971 (4th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3478 (U.S. Jan. 13, 1992). Despite its reasonable reliance on the constitutionality of its income tax statutes, and other equitable considerations, Georgia faces a potential refund liability to federal retirees (with interest) of approximately \$100 million which has been budgeted and spent. When these factors are properly weighed, it is clear that refunds should not be awarded. This Court should either deny outright an award of refunds or permit the Georgia courts themselves, on remand, to weigh these factors in determining the appropriate relief.

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## CONCLUSION

Respondents respectfully request that the decision of the Georgia Supreme Court be affirmed.

WARREN R. CALVERT  
Senior Assistant Attorney  
General  
(Counsel of Record  
for Respondents)

MICHAEL J. BOWERS  
Attorney General

DANIEL M. FORMBY  
Senior Assistant Attorney  
General

*Attorneys for Respondents*

Georgia Department of Law  
132 State Judicial Building  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300  
(404) 656-3370



## APPENDIX A

**O.C.G.A. § 48-3-1. Execution for collection of money due the state; affidavit of illegality.**

The commissioner may issue an execution for the collection of any tax, fee, license, penalty, interest, or collection costs due the state. The execution shall be directed to all and singular sheriffs of this state or to the commissioner or his authorized representatives and shall command them to levy upon the goods, chattels, lands, and tenements of the taxpayer. Each sheriff shall execute the execution as in cases of writs of execution from the superior courts. Whenever any writ of execution has been issued by the commissioner, the taxpayer, in order to obtain a determination of whether the tax is legally due, may tender to the levying officer his affidavit of illegality to the execution and, upon his payment of the tax if required as a condition precedent by the law levying the tax or upon his giving a good and solvent bond in such an amount to cover the total of any adverse judgment plus costs where the law does not require the payment of the tax as a condition precedent, the levying officer shall return the affidavit of illegality, except as otherwise provided by law, to the superior court of the county of the taxpayer's residence. The affidavit of illegality shall be summarily heard and determined by the court.

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No. 93-908

U.S. SUP. CT.
FILED
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

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CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS AND THE GEORGIA  
DEPARTMENT OF REVENUE,  
*Respondents.*

---

On Writ of Certiorari to the  
Supreme Court of Georgia

---

**REPLY BRIEF FOR PETITIONER**

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CARLTON M. HENSON  
*Counsel of Record*  
MCALPIN & HENSON  
Eleven Piedmont Center  
Suite 400  
3495 Piedmont Road, N.E.  
Atlanta, Georgia 30305  
(404) 239-0774



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REPLY BRIEF FOR PETITIONER

---

ARGUMENT

**I. THE DURESS FACED BY PETITIONER AND  
OTHER FEDERAL RETIREES WAS CONSTITU-  
TIONALLY SIGNIFICANT.**

Each and every predeprivation remedy argued by the Respondents includes the risk of criminal prosecution,<sup>1</sup> the risk of summary collection procedures,<sup>2</sup> a penalty of 25% of the tax due,<sup>3</sup> and an annual interest of 12%.<sup>4</sup> Of the four procedures claimed by the Respondents, one, declara-

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<sup>1</sup> O.C.G.A. § 48-7-2 (1982). See Brief for Petitioner, pp. 11-14.

<sup>2</sup> O.C.G.A. § 48-2-55, 48-2-56 (1991 & Supp. 1993). See Brief for Petitioner, pp. 16-17.

<sup>3</sup> O.C.G.A. § 48-7-86 (1982 & Supp. 1993). See Brief for Petitioner, pp. 14-16.

<sup>4</sup> O.C.G.A. § 48-2-40 (1991). See Brief for Petitioner, p. 16.

tory and injunctive relief, was denied Petitioner and other retirees.<sup>5</sup> Another, administrative review, has been described as "futile" in constitutional cases by the Georgia Supreme Court.<sup>6</sup> The remaining two, superior court review and the affidavit of illegality, impose the additional burden of a bond requirement equal to the amount of the tax.

Thus, to have obtained review of the tax without actually paying it to the Commissioner, a federal retiree would have first had to break the law by refusing to pay the tax when due. Next, the retiree would have had to await issuance of an assessment. From this point the retiree could have chosen to post a bond equal to the tax due and sought superior court review.<sup>7</sup> Alternatively, the retiree could have awaited execution, filed an affidavit of illegality, and posted a bond to obtain superior court review.<sup>8</sup> During the entire pendency of this process the retiree would have remained subject to criminal prosecution, the risk of summary remedies, the penalty accruing up to 25% of the tax due, and interest at 12% per year.

Further, for his last 1988 estimate which was not paid, Petitioner was subject to the immediate imposition of a lien on all property rights without the issuance of an assessment.<sup>9</sup> Even without execution, a lien is itself a constitutionally cognizable deprivation. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988).

Additionally, execution on this lien could have proceeded *without notice*.<sup>10</sup> The Respondents argue at note

<sup>5</sup> See Brief for Petitioner, pp. 17-18, 20-22.

<sup>6</sup> *Flint River Mills v. Henry*, 234 Ga. 385, 386, 216 S.E.2d 895, 897 (1975).

<sup>7</sup> O.C.G.A. § 48-2-59 (1991).

<sup>8</sup> O.C.G.A. § 48-3-1 (1991).

<sup>9</sup> See Brief for Petitioner, pp. 25-26.

<sup>10</sup> *Fowler v. Strickland*, 243 Ga. 30, 33, 252 S.E.2d 459, 461 (1979).

4 on page 19 of their brief that this was Petitioner's fault. Instead of returning the tax due but unpaid because of *Davis*,<sup>11</sup> Respondents claim he should have shown the income as tax exempt. (Of course, at the time, the State told retirees the tax was due but that they could file a refund claim.<sup>12</sup> We now know, per *Reich I*,<sup>13</sup> that that course of action was also "wrong.").

Even had Petitioner and other retirees shown the income as tax exempt, though, they could get no review until an assessment was issued. Once the assessment was issued, they would have been immediately subject to the imposition of a lien under O.C.G.A. § 48-2-55 (1991 & Supp. 1993).

For Georgia federal retirees, the cumulative effect of these sanctions was constitutionally significant duress. As Petitioner testified in this case:

I was fully cognizant of the fact that failure to pay taxes on that retired pay would lead to the series of compliant steps which the Department has at its disposal by the Tax Code of the State of Georgia.

I dared not, and my summary is I was not prepared to challenge the system in order to make a point on principle, because I knew that the long arm of the Department was much longer and much stronger than I.

(Reich dep., p. 41.)

Not only do these sanctions strongly deter a predeprivation challenge, the amount of tax in issue discourages any such challenge. For Petitioner, the most he will recover for any single tax year is \$1,134. (Reich dep., Ex. 25.)

<sup>11</sup> Reich dep., Ex. 17.

<sup>12</sup> Thomassen dep., Ex. 2.

<sup>13</sup> *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992).



For all retirees who filed refund claims, the average annual claim is only \$707. (Thomassen dep., Ex. 5.) Thus, for the majority of retirees, the potential criminal fine of \$1,000 exceeds the amount of tax in issue.<sup>14</sup>

The Respondents claim that criminal prosecution was not really a risk. Brief for Respondents, pp. 34-37. While conceding that O.C.G.A. § 48-7-2 (1982) appears to impose criminal sanctions for nonpayment without regard to wilfulness, the Respondents claim that this code section was completely struck down in *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985).

Petitioner previously noted that the Georgia Supreme Court had held that the portion of the statute authorizing imprisonment was unconstitutional, but that this holding implicitly left standing the alternative criminal punishment of a fine under O.C.G.A. § 17-10-3 (1990 & Supp. 1993). Brief for Petitioner, p. 11. The Respondents now argue, however, that in *Higgins*, "the court invalidated the provision in its entirety." Brief for Respondents, p. 35.

This conclusion is simply wrong. Respondents concede that the Georgia Supreme Court has the power to sever one portion of a statute as unconstitutional, citing *Nixon v. State*, 256 Ga. 261, 264, 347 S.E.2d 592, 594 (1986). Brief for Respondents, p. 36, n.6. This is precisely what the court did in *Higgins*. It did not say that 48-7-2 was unconstitutional "in its entirety" or anything close to that. Rather, the court expressly limited its holding:

Therefore, we agree that § 48-7-2(a)(1) is unconstitutional on state law grounds *to the extent that it authorizes imprisonment* for mere nonpayment of income taxes.

*Higgins*, 254 Ga. at 90, 326 S.E.2d at 730 (emphasis added).

Further, the concurrence in *Higgins* specifically noted that:

<sup>14</sup> O.C.G.A. § 17-10-3 (1990 & Supp. 1993). See Brief for Petitioner, pp. 11-12.

[T]his case (and particularly Division 4) should not be considered as a proscription of all possible criminal sanctions for failure to pay taxes.

*Id.*

Thus, the court in *Higgins* went to great lengths to make the ruling as narrow as possible. To the extent that 48-7-2 authorizes a punishment other than imprisonment (i.e. a fine) for nonpayment, it remains constitutional and valid.

The Respondents further argue that, in any event, the Petitioner did not pay his estimate due in April 1989, and that he was not prosecuted or subjected to the imposition of a lien on his property or any other summary remedy. According to the Respondents, this demonstrates that a taxpayer will not be prosecuted or otherwise subjected to sanctions for a "good faith belief" that a tax is now owed. Brief for Respondents, p. 37. This argument implies a remarkable proposition: a taxpayer's good faith belief that a tax is not owed is the legal equivalent of a U.S. Supreme Court decision squarely on point invalidating the tax. This suggestion is patently absurd.

While these facts and this argument might provide future reassurance that, whenever there is a U.S. Supreme Court decision squarely on point, Georgia taxpayers will not be prosecuted criminally if they refuse to pay the tax, Petitioner and other federal retirees did not have this assurance in April of 1989. At that time, the State took the position that, even after *Davis*, income taxes on federal retiree pay were still due and payable for tax year 1988. See Thomassen, Ex. 2. "[Governor] Harris Rejects Call to Suspend Taxing of Federal Retirees," *The Atlanta Journal and Constitution*, April 8, 1989, § C at 5. A retiree who sought counsel at that time would have learned that O.C.G.A. § 48-2-81 imposes an obligation on state authorities to prosecute nonpayment of taxes, and a retiree would have learned that in *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the State threatened

criminal prosecution even though there was a valid, good faith challenge to the tax.

According to the Respondents there was no duress here though because Petitioner was "never threatened with levy, attachment, garnishment or other sanctions." (Brief for Respondents, p. 30.) According to their amici, the "simple existence" of summary remedies and criminal sanctions cannot constitute duress. Brief of National Governor's Assoc., *et al.*, p. 22. Under this view, a state official must articulate a specific threat. But Georgia law does not require this intermediate step before proceeding with sanctions. The first notice a criminal defendant frequently receives is when he is arrested. The only notice a taxpayer might receive of a garnishment is that his money has been taken by the state.<sup>15</sup> At these late stages, there is no assurance that payment would result in a dismissal of the indictment or recovery of the property taken. This Court has never held that a taxpayer must await criminal indictment or the actual loss of property for there to be constitutionally significant duress.

Thus, the Commissioner's unilateral choice after *Davis* not to prosecute retirees or impose summary remedies is irrelevant in determining whether retirees faced these risks at the time the tax was due.

Further, the Respondents cannot escape that, in spite of *Davis*, they immediately imposed the penalty and interest on those federal retirees who did not pay the tax.

At least two state supreme courts have found that less severe sanctions constitute duress under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). The Iowa Supreme Court concluded that:

[W]e are convinced that, by *McKesson* standards, tax payment in Iowa continues to be less "voluntary" than "under duress." [citations omitted]

<sup>15</sup> *Fowler v. Strickland*, 243 Ga. 30, 33, 252 S.E.2d 459, 461 (1979).

For example, Iowa Code section 422.25(2) provides a penalty of seven and one-half percent for failure to pay ninety percent of the tax due when filing the return. *See also* Iowa Admin. Code 10.41(3), (5) (adjusting computation of penalty under section 422.25(2) depending on taxable year). Section 422.26 grants the state a tax lien on all of a taxpayer's property for failure to pay assessments when due. And, of course, interest accrues on all unpaid taxes at a rate tied to the prime. *See* Iowa Code § 421.7(2).

*Hagge v. Iowa Dep't of Revenue and Finance*, 504 N.W.2d 448, 451 (Iowa 1993).

Similarly in *Service Oil, Inc. v. North Dakota*, 479 N.W.2d 815, 822 (N.D. 1992), the court held that a 5% fine, 12% annual interest and the possible loss of a business license constituted duress.

Finally, the Respondents and their amici do not claim that the sanctions imposed in this case should be withdrawn, that they were imposed by mistake, or that they were imposed by inadvertence. Rather, the Respondents and their amici argue that these sanctions are necessary. The Respondents suggest that these sanctions are "reasonable measures designed to see that taxes are paid that are legally owed." Brief for Respondents, p. 27. Amici Curiae Alabama, *et al.* argue that states "must be able to include financial sanctions." Brief of Alabama, *et al.*, pp. 9-16. Amici Curiae National Governor's Assoc., *et al.*, argue that without penalties, taxpayers would have every incentive not to pay taxes. Brief of National Governor's Assoc., *et al.*, p. 23. In short, despite the enormous power and resources of the State, Respondents and their amici claim they need special powers to deal with individual taxpayers and that an evenhanded or balanced approach would be "disastrous." Brief of Amici Curiae Alabama, *et al.*, p. 12.



These arguments demonstrate a fundamental misunderstanding of *McKesson*. Unquestionably, financial sanctions and summary remedies are already *permissible* under due process.

*McKesson* makes this explicit:

To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies such as distress sales in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

*McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990).

When a state elects these sanctions, though, *McKesson* obligates the state "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31. Thus, *McKesson* provides the states a choice. States may require a predeprivation process, but it must be free of duress. *Id.* at 32-33, 38 n.21. If states believe sanctions and penalties are necessary, they are free to impose them, but they must then provide post-deprivation relief. If they make this choice, the states retain "freedom to impose various procedural requirements on actions for post-deprivation relief." *Id.* at 45.

Additionally, *McKesson* does not preclude the imposition of penalties for frivolous claims and lawsuits.<sup>16</sup>

All this is not enough for the states though. What the Respondents and their amici seek is a drastic rewrite of *McKesson*. They want to have their proverbial cake and eat it, too. In short, they ask this Court to allow them to extort illegal taxes from their citizens with impunity.

<sup>16</sup> See, e.g., O.C.G.A. § 51-7-80 (1989 & Supp. 1993).

## II. NEITHER SOVEREIGN IMMUNITY NOR EQUITY PRECLUDE REFUNDS.

The Respondents and the Brief of Amici Curiae of the National Governor's Association, *et al.*, assert that sovereign immunity precludes refunds or any other meaningful backward-looking relief in this case. In effect, the Respondents and their amici ask this Court to reverse its unanimous decision in *McKesson*:

The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

496 U.S. at 31.

According to Amici Curiae National Governor's Association, *et al.*, the entire holding of *McKesson* is predicated on the existence of a state refund remedy which waives sovereign immunity. See Brief of Amici Curiae of the National Governor's Ass'n, *et al.*, pp. 6-7. According to these amici, the issue of sovereign immunity was critical to the analysis in *McKesson*, even though it is only referenced indirectly in a single footnote, 496 U.S. at 49, n.34.

The amici ignore this Court's discussion in *McKesson* of several cases where refunds were awarded for unconstitutional taxation. These cases include *Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) and *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931). All of these cases award refunds of illegally collected taxes without regard to sovereign immunity.



As this Court held in *Carpenter, supra*, "A denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." 280 U.S. at 369. The sovereign immunity question has already been answered adversely to Respondents.

Nor can equity be used to defeat Petitioner's claims for refunds. "Equitable considerations are of limited significance once a constitutional violation is found." *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 183 (1990). "Once a constitutional decision applies [retroactively] and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered." *Id.* at 194; *see also, McKesson*, 496 U.S. at 50.

Equitable considerations may shape the relief awarded, but they may not be used to deny relief altogether. *McKesson*, 496 U.S. at 50. In *McKesson*, the Court remanded for "fine tuning" of the relief and in *Harper*, the state was allowed an opportunity for "the crafting of any appropriate remedy" so long as the "relief satisfies the minimum federal requirements we have outlined." *Harper v. Virginia Dep't of Taxation*, 509 U.S. —, 113 S. Ct. 2510, 2521 (1993), *citing McKesson*, 496 U.S. at 51-52.

Georgia has already decided that there is no state remedy that provides meaningful backward-looking relief. Moreover, the Georgia Supreme Court has had two opportunities to consider this case in circumstances where it knew *Davis* applied retroactively and it knew *McKesson* set the minimum standards of due process. In both instances, relief was denied.

This case presents the pure question of what are the minimum requirements for the remedy for a due process violation. In *Harper*, this Court indicated that it was

meaningful backward-looking relief to all those adversely effected by the illegal tax.

Petitioner respectfully submits that that is the standard that should be applied in this case. Further, given the extended passage of time, interest should be included. This Court has held that a temporary taking of property by the government requires compensation for the value of the property during the time it was taken. *See First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-322 (1987). Here the property taken was money, and the measure of its value during the time it was taken is interest.<sup>17</sup>

### III. GEORGIA'S REFUND STATUTE PRECLUDES A FINDING THAT THE REMEDIAL SCHEME WAS CLEAR AND CERTAIN.

Respondents virtually ignore Petitioner's assertion that Georgia's remedial scheme was not clear and certain because it provided a plain post-deprivation remedy that was eliminated after the time for any other remedy had passed. The Respondents' strategy is understandable since they do not and cannot dispute that, until *Reich I* was decided in November 1992, Georgia's refund statute provided an unqualified right to refunds of illegal taxes.<sup>18</sup>

Rather than challenge this point on the merits, the Respondents suggest that this is an issue this Court has declined to hear. Brief for Respondents, pp. 38-41. Petitioner's Petition for Writ of Certiorari sought review of two questions, and this Court declined to hear the second question. As briefed in the Petition, this first question included the same argument regarding the refund statute

<sup>17</sup> Georgia law provides for interest on tax refunds at 9% simple interest (O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993)). It also provides prejudgment interest on liquidated claims at 7% simple interest (O.C.G.A. § 7-4-15 (1989)).

<sup>18</sup> *See* Brief for Petitioner, pp. 26-29.

discussed on pages 26-29 of Petitioner's brief on the merits. The second question raised the issue of whether the refund statute created a separate property interest protected by due process. Petition for Writ of Certiorari, pp. 19-25. This is a distinct question from whether the refund statute rendered the entire scheme violative of *McKesson* because it was a remedy plainly available until 1992. This latter point was recently addressed by the Minnesota Supreme Court in *Cambridge State Bank v. James*, 514 N.W.2d 565, 571 (Minn. 1994):

To rely on the banks' use of the refund statute to now deny them a remedy would effectively deny the banks a meaningful hearing without adequate notice. Prior to the *McKesson* decision, taxpayers had no notice that they were required to take advantage of any predeprivation procedures in order to qualify for a refund. Even if there was a predeprivation remedy in 1980, the banks did not know when they chose between filing for a refund in district court and filing in tax court, that in choosing a refund action, they were foreclosing their right to recovery. Moreover, the tax refund statute did not have a requirement that the tax be paid under protest or that the taxpayer attempt to first take his or her claim to tax court.

For this and other reasons, the Minnesota court concluded that the requirements of *McKesson* were not satisfied and ordered refunds.

For federal retirees in Georgia, the refund statute was a viable remedy with a three-year limitation period. By relying upon and following this statute, they had no way of knowing they were foreclosing all right to relief. As in *Cambridge State Bank*, the requirements of *McKesson* and *Harper* are not met under these facts.

Respectfully submitted,

CARLTON M. HENSON  
*Counsel of Record*  
 MCALPIN & HENSON  
 Eleven Piedmont Center  
 Suite 400  
 3495 Piedmont Road, N.E.  
 Atlanta, Georgia 30305  
 (404) 239-0774



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Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CHARLES J. REICH,  
v. *Petitioner,*

MARCUS E. COLLINS AND  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the  
Supreme Court of the State of Georgia

BRIEF OF COMMITTEE ON STATE TAXATION  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KENDALL L. HOUGHTON \*

*Tax Counsel*

WILLIAM D. PELTZ

ELIZABETH C. BURTON

*Chair and Vice Chair,*

*Lawyers' Coordinating*

*Subcommittee*

COMMITTEE ON STATE TAXATION

122 C Street, N.W.

Suite 330

Washington, D.C. 20001

(202) 484-5222

\* Counsel of Record

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On Writ of Certiorari to the  
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BRIEF OF COMMITTEE ON STATE TAXATION  
 AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Committee on State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and

promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

Many of COST's members are engaged in business in the State of Georgia, and thus have a particular interest in the ultimate settlement of the remedial landscape of Georgia. However, COST's concern with this case is both more abstract and more universal—the Due Process issues raised by this case are of national concern. This case is representative of several others, including *Harper v. Virginia Dept. of Taxation*, 509 U.S. —, 113 S. Ct. 2510 (1993)<sup>1</sup>, wherein States have been attempting to avoid liability for refunding taxes successfully challenged as being unconstitutional without resort to—or with clear disregard of—the standards for relief set forth by this Court in *Harper and McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990). Such behavior on the part of the States impacts the remedy for every type of unconstitutional tax. See, e.g., *Norwest Bank Duluth, National Association (formerly First National Bank of Duluth) v. John P. James, Commissioner, Dept. of Revenue, State of Minnesota*, Minn. S. Ct. No. CO-89-2097 (April 1, 1994) (banks challenging income tax discriminating against federal obligations); *James B. Beam Distilling Co. v. Georgia II*, 263 Ga. 609, 437 S.E.2d 782 (1993), appeal filed, 62 U.S.L.W. 3503 (No. 93-1140, January 13, 1994) (liquor distributors challenging excise tax discriminating against out-of-state products). Therefore, COST has an interest in this case.

<sup>1</sup> On remand to the Virginia courts for determination of the question whether Virginia provided a constitutional sufficient remedy, the Alexandria Circuit Court followed Georgia's lead in identifying two alleged predeprivation remedies that precluded a requirement of paying refunds to federal retirees. *Harper v. Virginia Dept. of Taxation*, Alexandria Cir. Ct. Law Nos. CL891080, 890462, 890463, and 891081 (Jan. 7, 1994).

## SUMMARY OF ARGUMENT

"Nothing in life is certain," but the Constitution embodies language designed to make some things less uncertain. The Fourteenth Amendment guarantees a minimum level of "due process." The Due Process Clause embodies guiding principles for conduct of the States with respect to those over whom they exercise jurisdiction, including the principles of certainty, fairness, balancing of interests (the State's and the individual's), and respect for property rights. All four of these principles are implicated by the structure and operation of a State's taxation and remedial schemes.

This case presents the clearest evidence that when faced with a State's fiscally grounded arguments against providing relief, many State courts will disregard the basic tenets of Due Process in order to avoid paying refunds to a taxpayer who has *successfully* challenged a state tax before this Court. The Georgia Supreme Court's response to the adversely impacted taxpayers in this case has itself been violative of Due Process in at least two respects. First, by (i) refusing to acknowledge the duress which attaches to any alleged predeprivation remedies by operation of other Georgia laws, and (ii) denying the applicability of the postdeprivation refund statute to taxes later found to be unconstitutional, the Court tilts the scales balancing State and taxpayer interests completely in its favor and deprives taxpayers of the "clear and certain" remedy to which they are entitled under Due Process. Second, by relying on the taxpayers' use of a post-deprivation remedy (the refund statute) and failure to pursue predeprivation relief to subsequently deny the taxpayers a remedy to an unconstitutional tax, the Court in effect denied the taxpayers a meaningful opportunity to challenge the tax without adequate notice. This violation of Due Process is particularly offensive because the Court issued an earlier specific ruling to the Georgia retirees in question that the refund statute was the appropriate recourse for the injury



suffered by them, as opposed to the predeprivation relief actually sought.

This Court should not defer to the interpretation of state taxation schemes by state courts where such courts either consciously disregard or purport insincerely to apply Due Process principles in such a way as to achieve a predetermined result, *i.e.*, the denial of refunds to taxpayers who have been subject to an unconstitutional tax. An analogy may be found in the area of integration of public schools. In *Harrison v. NAACP*, 360 U.S. 167 (1959), this Court recognized the unfairness of allowing state courts to interpret laws of the State in such a manner as to impede integration and to nullify the effect of its holding in *Brown v. Board of Education*, 347 U.S. 483 (1954):

Of course Virginia courts were not parties to the formulation of that legislative program. But they are interpreters of Virginia laws and bound to construe them, if possible, so that the legislative purpose is not frustrated. Where state laws make such an assault as these do on our decisions and a State has spoken defiantly against the constitutional rights of the citizens, reasons for showing deference to local institutions vanish. The conflict is plain and apparent; and the federal courts stand as the one authoritative body for enforcing the constitutional rights of the citizens.

*Harrison*, 360 U.S. at 182. COST is not suggesting the use of federal courts as courts of original jurisdiction in state tax cases; but COST is suggesting that very clear and very certain guidelines be set out for use by state courts in remedy cases.

## ARGUMENT

### I. FOUR HISTORICAL CONCERNS UNDERLYING THE CONSTITUTIONAL MANDATE OF THE DUE PROCESS CLAUSE ARE CLEARLY IMPLICATED BY THIS CASE

Amendment 14, sec. 1 of the United States Constitution forbids any State to "deprive any person of life, liberty, or property, without due process of law." At least four concerns underlie this expression of the limitation on States' power: (1) certainty, (2) balancing of interests, (3) fairness, and (4) respect for property rights.

First, Due Process embodies the need for certainty in the system. A well-ordered and stable society is founded on (i) the due provision of notice concerning one's rights and responsibilities, and (ii) consistency in the fact and manner of application and enforcement of such rights and responsibilities. Because government, both State and federal, determines the parameters of an individual's rights and responsibilities (presumably within the context of other constitutional restraints), it is paramount that government also enable individuals to function within these parameters. For instance, "[i]t is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Rose v. Locke*, 423 U.S. 48, 49 (1975) (citations omitted). Furthermore, "[t]he principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation. . . ." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 463 (1927). Justice Holmes identified this "reasonable certainty" in the context of taxpayers' and States' rights vis-a-vis each other in tax controversies:

It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The



rule being established that apart from special circumstances he cannot interfere with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

*Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). The need for certainty becomes more obvious as the number of paths alleged to be available to an individual to either comply with a statutory requirement or to challenge it increases.

Second, Due Process incorporates a balancing principle, as between the interests of the State and the individual. There may be a deprivation of either life, liberty, or property, so long as this deprivation is accomplished in accordance with legal procedures that permit the individual to contest the deprivation. With respect to the appropriate manner of effecting deprivations, this Court has affirmed that

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) (citations omitted). In the context of state taxes, the interests to be balanced include the orderly administration of revenue laws (the State), the conservation of the public fisc (the State), the right to notice of assessment (the taxpayer) and the opportunity to challenge a proposed or actual assessment (the taxpayer).

Third, the Due Process Clause embodies the basic notion that a civilized and regulated society must enforce "our traditional conception of fair play and substantial justice" against a State's conduct toward its citizens, taxpayers, and others with "presence" in the State. *International Shoe Co. v. Washington*, 326 U.S. 310, 317-320 (1945). See also *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1941); and *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949). Nothing could be more violative of the concept of fairness than to permit a State to retain revenues from a tax that it should not have imposed or collected in the first place.

Fourth, Due Process incorporates the Framers' respect for individual tangible and intangible property rights. The Court has acknowledged this significant concern with respect to state taxes: "Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exaction in order to satisfy the commands of the Due Process Clause." *McKesson*, 110 S. Ct. at 2250. It is critical to note that in all spheres other than taxation, the "'root requirement'" of Due Process is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted); *McKesson*, 110 S. Ct. at 2250.

These four concerns have been distilled into the requirements set forth in *Atchison* and *McKesson*, that a taxpayer aggrieved by an unconstitutional tax must have a clear and certain remedy.

## II. DUE PROCESS REQUIRES A PARTICULAR SENSITIVITY TO POST-PAYMENT CHALLENGES TO A TAX

In state tax cases dating back to the turn of the century, this Court has consistently recognized and accommodated the respective needs of States and taxpayers, to



ensure the integrity of the public fisc through collection of tax revenues, and to be provided meaningful opportunities to challenge taxes on permissible grounds with the assurance that Due Process will be accorded such challenges. In *McKesson*, this Court held that Florida was entitled to "employ various financial sanctions and summary remedies" designed to protect the State's interest in financial stability:

Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls and by making the ultimate collection of validly imposed taxes more difficult.

*Id.* at 2250.

Nevertheless, Due Process requires a particular sensitivity to post-payment challenges to a tax precisely because the State may deny a predeprivation opportunity to contest that tax or so limit its purported predeprivation remedies as to make them meaningless. The taxpayer is entitled to Due Process in terms of a clear, certain and fair remedy in the event the tax paid was invalid:

[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

*Id.* at 2247.

"Bait and switch" tax challenge schemes and remedial "shell games" *ipso facto* violate both the spirit and substantive principles of Due Process. In this instance, Georgia has said that its refund statute is inapplicable, and there are no other postdeprivation remedies; however, as Petitioner shows, none of the purported predeprivation remedies are free of duress and hence are not clear and

certain. Not only is the Georgia Supreme Court's behavior in the current case an egregious example of a "[fiscal] ends justifies the means" jurisprudence, but it cannot square with the four Due Process principles—certainty, fairness, balancing and respect for property rights—that this Court vigorously espoused in *McKesson* and its other Due Process jurisprudence, and reaffirmed most recently in *Harper*. Where sanctions are instituted which effect a significant deprivation of property, *e.g.*, the pre-contest payment of taxes alleged due to the State, and as a result there is no possibility of a pre-payment challenge to the validity of the tax in question, the State cannot thereafter tilt the scale completely and unjustly in its favor by refusing to provide meaningful backward-looking relief upon a successful post-deprivation challenge.

### III. DUE PROCESS ADEQUATE NOTICE AND ACCOUNTABILITY ARE LACKING WHERE THE GEORGIA SUPREME COURT HAS DECLARED THE REFUND STATUTE INAPPLICABLE TO UNCONSTITUTIONAL TAXES, IN THIS CASE

Your *amicus* respects this Court's restraint of its powers of review. Certiorari was granted in this case on only one of the two questions presented by Petitioner; the question not certified for review was: "Whether a state may collect taxes from its citizens in violation of the Constitution, provide a right to refunds for the unconstitutional taxation, and then eliminate the right to refunds after the time has passed for any other relief." The manner in which a State's highest court chooses to interpret its own body of laws as applied to its citizens and those over which it has constitutional (*i.e.*, Due Process) jurisdiction may well command deference on the part of all other judicial bodies, including this Court. However, there is an underlying issue to be inferred from the above question presented, which is the cause of the greatest concern to COST and other taxpayers throughout the country:

Whether reliance by a State on a taxpayer's use of a post-deprivation remedy to later deny the taxpayer a remedy to an unconstitutional tax in effect violates Due Process because the State has denied the taxpayer a meaningful hearing without adequate notice.

The Georgia Supreme Court's remarkable interpretation of the scope of its refund statute as not being applicable to unconstitutional taxes, but only to "erroneously or illegally assessed" taxes, O.C.G.A. § 48-2-35, may withstand the very basic and lenient scrutiny applied by this Court when reviewing such cases. *Cf. Bell v. State of Maryland*, 378 U.S. 226, 237 (1964) (Court declined to decide applicability of saving clause as matter of Maryland law, in light of a post-challenge change to the statute, because "[s]uch a course would be inconsistent with our tradition of deference to state courts on questions of state law"). However, the unfair result wrought by such an interpretation cannot be deemed to pass Due Process muster. Denying the taxpayer the use of a refund statute that was available at the time the taxpayer committed to a choice of remedies<sup>2</sup> injects the highest degree of uncertainty into the State's tax procedures, is blatantly unfair, serves no legitimate state tax administrative need (nor any need other than retention of illegally collected taxes), and evinces a total disregard for the taxpayer's property rights.

At least one State supreme court has come to understand and enforce this principle. In *Norwest Bank Duluth*, the Minnesota Supreme Court was forced to address whether that State provided a "meaningful predeprivation remedy" to banks challenging a state tax on income from federal obligations, in light of *Harper* and *McKesson*. The Court concluded that its prior refusals to grant refunds to banks, even though the taxation scheme had been ac-

<sup>2</sup> A refund claim filed under O.C.G.A. § 48-2-35, which the Georgia Supreme Court had stated on previous occasions was one of the available remedies. See, e.g., *Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E.2d 74, 75 n.1 (1989).

knowledgeed unconstitutional, was wrong for two reasons. First, no meaningful predeprivation remedy existed for those petitioners, under the facts of the case. Second, inadequate notice was provided to the banks that their course of action would result in forfeiture of the opportunity to be heard and to challenge the tax:

The existence of the tax refund statute in Minnesota provides further support for our decision. *To rely on the banks' use of the refund statute to now deny them a remedy would effectively deny the banks a meaningful hearing without adequate notice.* Prior to the *McKesson* decision, taxpayers had no notice that they were required to take advantage of any predeprivation procedures in order to qualify for a refund. Even if there was a predeprivation procedure in 1980, the banks did not know when they chose between filing for a refund in district court and filing in tax court, that in choosing a refund action, they were foreclosing their right to recovery.<sup>11</sup>

[Footnote 11: *That issue did not arise in McKesson itself because the Court there found that taxpayers did not have a meaningful predeprivation remedy, thus a remedy was due regardless of whether it was required under Florida's tax refund statute.*]

*Norwest Duluth*, Slip Opin. at 11 (emphasis added). The Due Process principle identified by the Minnesota Supreme Court that is equally compelling in this case is that a taxpayer is entitled to adequate notice of the procedures which they will be expected to follow, in order to challenge the constitutionality of a tax and be entitled to relief.

If anything, the facts in this case are more reprehensible than those with respect to which the Minnesota Supreme Court has recognized and rectified an unfairness to taxpayers. To be told on one occasion, as Georgia retirees were told by the Supreme Court of the State,<sup>3</sup>

<sup>3</sup> *Collins v. Waldron*, *supra*.



that the refund statute was the appropriate recourse for the injury alleged *and* the various methods of predeprivation relief pursued were *not* appropriate, and subsequently to be told that (i) the refund statute does not apply to the injury suffered by retirees and (ii) predeprivation remedies foreclosed the requirement that refunds be provided, is offensive to all notions of Due Process, both aboriginal and jurisprudential. As confusing as this might be to a sophisticated corporate taxpayer, equipped with either professional staff or retained counsel, it must be utterly incomprehensible to individual taxpayers, who have been told that they are right but are now the victims of the bait and switch tactics of the Georgia tax administrators and courts.

This Court is being called upon to enforce the strict and nondeviating application of remedial guidelines set forth in *Harper* and *McKesson*, which guidelines are derived directly from absolute constitutional Due Process tenets. This case presents but one example of the compelling need for this Court to call State courts to heel; just as accountability is demanded of the taxpayer in its dealings with the State, fairness requires that the State be held to the same level of accountability.

## CONCLUSION

For the reasons set forth above, the Committee on State Taxation respectfully requests that the decision of the Georgia Supreme Court in this case be reversed, and that the Georgia Supreme Court be ordered to restore the taxpayer to the same economic condition that the taxpayer would have been in, had the tax not been paid in the first place.

Respectfully submitted,

KENDALL L. HOUGHTON \*

*Tax Counsel*

WILLIAM D. PELTZ

ELIZABETH C. BURTON

*Chair and Vice Chair,*

*Lawyers' Coordinating*

*Subcommittee*

COMMITTEE ON STATE TAXATION

122 C Street, N.W.

Suite 330

Washington, D.C. 20001

(202) 484-5222

Dated: April 15, 1994

\* Counsel of Record

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF TAX EXECUTIVES INSTITUTE, INC.  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

TIMOTHY J. MCCORMALLY  
*Counsel of Record*

MARY L. FAHEY

TAX EXECUTIVES INSTITUTE, INC.  
1001 Pennsylvania Avenue, N.W.  
Suite 320  
Washington, D.C. 20004-2505  
(202) 638-5601

*Counsel for Amicus Curiae*  
*Tax Executives Institute, Inc.*



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IN THE  
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CHARLES J. REICH,  
 v. *Petitioner,*

MARCUS E. COLLINS and  
 THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF TAX EXECUTIVES INSTITUTE, INC.  
 AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petitioner.<sup>1</sup> Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent more than 2,400 of the leading businesses in the United States and Canada.

<sup>1</sup> Tax Executives Institute has received the written consents of the Petitioner and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause, Due Process, and Equal Protection rights of all taxpayers. Our members have a significant interest in the standards to be applied with respect to state remedies for unconstitutionally collected state taxes.

This case raises fundamental questions concerning the remedies available for taxpayers who have paid state taxes that are subsequently found to contravene the Constitution. In 1989, the Court held in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), that 4 U.S.C. § 111 (1985) and the constitutional doctrine of intergovernmental tax immunity (as derived from the Supremacy Clause) prohibit the States from taxing federal annuitants more harshly than state annuitants. Four years later, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991)—that *Davis* must be applied retroactively by all courts. The Court remanded the case to the Virginia court with instructions to fashion an appropriate remedy in accordance with federal due process standards; cases affecting federal retirees in several other States—including Georgia—were similarly remanded. See, e.g., *Reich v. Collins (Reich I)*, 113 S. Ct. 3028-29 (1993), *vacating and remanding* 422 S.E.2d 846 (Ga. 1992).

This case focuses on whether the predeprivation remedy provided to federal retirees by the State of Georgia passes constitutional muster. The Institute's members and the businesses by whom they are employed have no direct

interest in the resolution of this case. They do, however, have a keen and vital interest in determining the remedies that must be accorded aggrieved taxpayers when a state statute is invalidated on constitutional grounds. The Court's decision in this case promises to affect far more than the State of Georgia's or other States' authority to retain the unconstitutional taxes they improperly collected from federal annuitants. Indeed, the strength and vitality of this Court's holdings on Commerce Clause, Equal Protection, and Due Process issues may well be affected. TEI is concerned about the potential effect of the Court's decision on the equitable administration of state taxing schemes, especially those relating to business taxpayers.

Because TEI members and the businesses by whom they are employed will be materially affected by the application of the Court's decision, the Institute has a special interest in the outcome of this case.

#### SUMMARY OF ARGUMENT

The core issue in this case—whether taxpayers who have been subjected to an unconstitutional tax levy are entitled to refunds of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. The specific issue before the Court is whether the State of Georgia must refund unconstitutionally collected taxes imposed on federal retirees. In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while exempting all or part of the pensions of state government retirees. Last term in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court confirmed that the *Davis* decision must be given retroactive effect by all courts. The instant case unequivocally brings the question of remedies to the Court.

The last decade and a half have seen an almost unprecedented number of state taxing statutes struck down



as unconstitutional. In many ways these cases are dissimilar. These cases involved different types of statutes, but there are two attributes they shared. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was not imposed on a favored class of taxpayers. Secondly, each of them triggered the same reaction by one or more of the States that imposed the unconstitutional taxes: an effort to avoid the consequences of their unconstitutional acts by applying the Court's holdings on a prospective-only basis.

The States' refusal to pay refunds—or to fashion other meaningful remedies for taxpayers who have suffered the unconstitutional wrong—was commonly rationalized on equity grounds. Although many argued that the balancing test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), could be applied to safeguard the constitutional rights of taxpayers without unduly penalizing the States, experience convinced this Court in *Harper* that the *Chevron Oil* framework was too pliant to be useful. Stated simply, many States did not apply the test in an even-handed or balanced manner, and hence, the results were neither fair nor defensible. Consequently, last term in *Harper* this Court embraced the full retroactivity standard of *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

The Supreme Court of Georgia did not dispute that the *Davis* decision applies retroactively. Nevertheless, the Georgia court refused to order a refund to the taxpayer, and that refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

Concededly, the Court's holding in neither *Harper* nor *Beam* reaches the issue of remedy. The Court's practice of eschewing the issue of remedies reflects the general principle that the question is properly addressed in the first instance by the state courts. The Constitution de-

mands, however, that the relief fashioned by the States accord with federal due process principles. Because there is no right without a remedy, the States should not be empowered to strip federal rules of their practical effect by conjuring up phantom procedural requirements that themselves deny taxpayers due process.

The State of Georgia's statutory scheme comports with the procedural requirements explicated by the Court in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990). The Georgia Code provides that a taxpayer "shall be refunded any and all taxes" that are determined to have been illegally assessed. GA. CODE ANN. § 48-2-35(a) (1991 and 1993 Supp.). Taxpayers here therefore seem indisputably entitled to seek refunds. This case is before the Court, however, because the court below found the statute inapposite and further found that Georgia law provided a constitutionally sufficient predeprivation remedy. That predeprivation remedy, however, was not even a glimmer in the State of Georgia's eyes until after the decision in *Harper* (three years after *McKesson* spelled out the need for either such a remedy or for meaningful backward-looking relief).

The purpose of the Due Process Clause is to protect individual rights against arbitrary action by the government, but what is more arbitrary than inventing and interposing new requirements after the time for satisfying those requirements has passed? The court below parsed the Georgia refund statute, and studied the other provisions of the Georgia Code, not in search of principle or justice, but for a loophole. This action simply does not pass muster under federal due process principles.

In the past decade, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution. The Court "cannot leave to the States the

formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967) (emphasis added). It is time for the Court to end its willing suspension of disbelief concerning the States' ability and willingness to flout the constitutional rights of taxpayers.

For far too long, State after State has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the constitutional rights of taxpayers. The States should not be permitted to thwart the judgments of this Court by conjuring up one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance.

Half a decade has passed since the Court held laws like the State of Georgia's here to be unconstitutional. Like the person who continually promises to reform but repeatedly fails, the word of the States should no longer be considered sufficient: They should be judged by their actions, and their actions should be found wanting. As the Court so forcefully, and rightfully, proclaimed in *Griffith v. Kentucky*: "The time for toleration has come to an end." 479 U.S. at 323.

The judgment of the court below should be reversed and a refund ordered to be made to the petitioner.

## ARGUMENT

*The time for toleration has come to an end.*<sup>2</sup>

### I.

The core issue in this case—whether taxpayers who have been subjected to an unconstitutional tax levy are entitled to refunds of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. To be sure, the taxing schemes invalidated by the Court have varied. And the focus of the Court's scrutiny has shifted from the constitutional infirmities of state statutes (under the Commerce Clause, the Due Process Clause, and the doctrine of intergovernmental immunity), to whether a holding of unconstitutionality must be given retroactive effect, to whether a State may properly deny refunds to taxpayers even after this Court has confirmed that a decision invalidating the statute applies retroactively. Nevertheless, the issue of refunds underlay all of the cases.

The specific issue before the Court in this case is whether the State of Georgia must refund taxes imposed on federal retirees in violation of the constitutional doctrine of intergovernmental immunity and 4 U.S.C. § 111 (1985). In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while exempting all or part of the pensions of state government retirees. Last term in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court confirmed that the *Davis* decision must be given retroactive effect by all courts. The instant case poses the issue whether refunds must be paid to federal retirees in Georgia who were subjected to the unconstitutional taxing scheme. It therefore unequivocally brings the question of remedies to the Court. That ques-

<sup>2</sup> *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (quoting *United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).



tion, however, was undeniably present in the related cases involving the constitutional issue (*Davis*) and retroactivity (*Harper*).

Taxpayers did not sue in *Davis* simply to have the Michigan statute invalidated. They sued for refunds of unconstitutionally collected taxes. Taxpayers did not sue in *Harper* simply to have the Court confirm that the decision in *Davis* applied retroactively in the Commonwealth of Virginia. They sued for refunds of unconstitutionally collected taxes. Here, finally, the issue of refunds is joined, but the Court cannot properly consider the case one of first impression. From the outset, taxpayers have been seeking the refund of what the States improperly took from them, and the States have been seeking to retain that which the Court has held they had no right to take in the first instance. This basic truth—that the States have funds properly belonging to the taxpayers—should impel reversal of the court below and a judgment ordering that a refund be made to the petitioner.

## II.

The last decade and a half have seen an almost unprecedented number of state taxing statutes struck down as unconstitutional. For example, in *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987), the Court invalidated the multiple activities exemption of Washington State's business and occupation (B&O) tax as repugnant to the Constitution's Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. This decision was preceded by *Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984), in which the Court held that the State of West Virginia's B&O tax similarly contravened the Commerce Clause.

The Court also invalidated a state taxing scheme in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which involved the State of Hawaii's exemption of local products from the liquor excise tax. In that case, the

Court concluded that the tax constituted unacceptable "economic protectionism" and therefore contravened the Commerce Clause. *Id.* at 273. This holding was reinforced by the Court's decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, —, 111 S. Ct. 2439, 2441 (1991), which struck down comparable statutes in Florida and Georgia, respectively.

In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), the Court considered the constitutionality of Pennsylvania's highway use tax. It struck down the law because it impermissibly imposed a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposed on its own residents who also engage in commerce among the States.<sup>3</sup> *Id.* at 286.<sup>4</sup> More recently, in *Davis* the Court held that the constitutional doctrine of intergovernmental tax immunity, which is derived from the Supremacy Clause (U.S. Const. art. VI, cl. 2), and the applicable federal statute (4 U.S.C. § 111 (1985)) precluded the State of Michigan from taxing federal annuitants more harshly than it taxed state annuitants. 489 U.S. at 817.

In many ways these cases are dissimilar. They involved different types of statutes (though with the exception of *Davis*, they all implicated the Commerce Clause rights of interstate businesses). But there are two attributes they share. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was not imposed (or not imposed to the same extent) on a favored class of taxpayers (be they domestic

<sup>3</sup> See also *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (holding unconstitutional the State of Alabama's discriminatory tax on foreign insurers).

<sup>4</sup> In *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), a divided Court declined to hold that its decision in *Scheiner* must apply retroactively.

businesses or state annuitants). Secondly, each of them triggered the same reaction by one or more of the States that imposed similarly unconstitutional taxes: an effort to avoid the consequences of their unconstitutional acts by applying the Court's holdings on a prospective-only basis. That is to say, even after the Court struck down the statutes as contravening the Constitution, some (albeit not all) States resisted efforts to refund the taxes that they had collected under the invalidated laws.<sup>5</sup>

The States' refusal to pay refunds—or to fashion other meaningful remedies for taxpayers who have suffered the unconstitutional wrong—was commonly rationalized on equity grounds. The States have essentially argued that the statutes at issue had been enacted in good faith, that the monies collected under those discriminatory statutes had already been spent, and that the issuance of refunds would threaten the fiscal well-being of the States. In reaching this result, the States generally employed the analysis set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), which focused on whether the decision established a new principle of law; whether, based on the history of the rule in question, its purpose, and effect, the nonretroactive application would advance or retard the operation of the new rule; and whether nonretroactive application was necessary to avoid injustice or hardship.

Although many argued that *Chevron Oil's* balancing test could be applied to safeguard the constitutional

<sup>5</sup> The refusal to apply the Court's holdings on a retroactive basis has not been universal. For example, following the decision in *Davis*, courts in several States properly ordered refunds to be issued to affected federal annuitants (following the state revenue departments' initial refusal to issue refunds). *E.g.*, *Pledger v. Bosnick*, 811 S.W.2d 286, 292 (Ark. 1991), cert. denied, 113 S. Ct. 3034 (1993); *Kuhn v. Colorado*, 817 P.2d 101, 110 (Colo. 1991), cert. dismissed, 112 S. Ct. 1925 (1992); *Hackman v. Director of Revenue*, 771 S.W.2d 77, 81 (Mo. 1989) (en banc), cert. denied, 493 U.S. 1019 (1990); *Burns v. New Mexico*, No. SF 89-1314(c) (1st Jud. Dist. Santa Fe County, Apr. 5, 1990). See also *In re Schirck*, No. 90-5201 RPD (Tax Comm'r of W. Va., Sept. 23, 1991).

rights of taxpayers without unduly penalizing the States (see, e.g., *Harper*, 113 S. Ct. at 2525 (Kennedy, J., with White, J., concurring), and *id.* at 2526 (O'Connor, J., with Rehnquist, C.J., dissenting)), experience convinced this Court in *Harper* that the *Chevron Oil* framework was too pliant to be useful. Stated simply, many States did not apply the test in an even-handed or balanced manner, and hence, the results were neither fair nor defensible. Too many of the States chose to interpret the three prongs of the Court's holding in a parochial, self-serving, result-oriented manner. In their quest for revenue, the States transmogrified the *Chevron Oil* test into a standard so malleable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis. The cumulative effect of all the States' actions could not help but influence this Court's decision last year to discard *Chevron Oil* in favor of a more absolute standard that more fully vindicated the rights of taxpayers and better served the goal of certainty.

Consequently, last term in *Harper* this Court embraced its earlier statement in *Griffith v. Kentucky*, 479 U.S. 314 (1987), that "[t]he time for toleration has come to an end." *Id.* at 323 (quoting *United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)). *Griffith* holds that new rules for the conduct of criminal prosecutions must apply retroactively to all pending or non-final cases, even if they constitute a "clear break" with the past. 479 U.S. at 328. In *Harper*, the Court extended the rule to civil cases, unequivocally holding that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law. *Harper*, 113 S. Ct. at 2513,<sup>6</sup> citing

<sup>6</sup> See *Harper*, 113 S. Ct. at 2517 ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").



*Griffith, supra, and Beam, supra.* Indeed, the Court noted that Justice Souter's opinion in *Beam* was itself unequivocal:

In announcing the judgment of the Court, Justice SOUTER laid down a rule for determining the retroactive effect of a civil decision: After the case announcing any rule of federal law has "appl[ie]d that rule with respect to the litigants" before the court, no court may "refuse to apply [that] rule . . . retroactively."

*Harper*, 113 S. Ct. at 2517 (quoting *Beam*, 111 S. Ct. at 2446) (brackets and ellipsis in original).

### III.

The Supreme Court of Georgia did not dispute that the *Davis* decision applies retroactively (though the trial court had done so). In light of the Court's holdings in *Beam* and *Harper*, it could hardly do so. See *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (it is for the Supreme Court to prescribe constitutional standards, and the lower courts are obliged to adhere to those standards "no matter how misguided the judges of those courts may think [them] to be."); accord *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Nevertheless, the Georgia court refused to order a refund to the taxpayer, and its refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

Concededly, the Court's holding in neither *Harper* nor *Beam* reaches the issue of remedy. Indeed, in *Harper*, the Court expressly declined to enter judgment for the taxpayers "because federal law does not necessarily entitle them to a refund." 113 S. Ct. at 2519. The Court's practice of eschewing the issue of remedies reflects the general principle that the question is properly addressed in

the first instance by the state courts. See *McKesson*, 496 U.S. at 32 n.16 ("In the recent past, after invalidating a state tax scheme on Commerce Clause grounds, we have left state courts with the initial duty upon remand of crafting appropriate relief in accord with both federal and state law." (citations omitted)). The Constitution demands, however, that the relief fashioned by the States accord with federal due process principles. *American Trucking Ass'ns v. Smith*, 496 U.S. at 181 (plurality opinion); accord *Harper*, 113 S. Ct. at 2519. Thus, while the States have previously retained flexibility in responding to this Court's decisions, *McKesson*, 496 U.S. at 39-40, that flexibility is not a license to eviscerate those decisions through legislative or juridical legerdemain.

In *Harper*, Justice Thomas explained that the Supremacy Clause does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. 113 S. Ct. at 2519. Because there is no right without a remedy, the States should similarly not be empowered to strip federal rules of their practical effect by conjuring up phantom procedural requirements that themselves deny taxpayers due process. That is precisely what has occurred in the instant case.

In *McKesson*, the Court stated that, to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a predeprivation hearing (without placing the taxpayer seeking such a hearing under duress<sup>7</sup>) or with meaningful backward-looking relief. 496 U.S. at 31-32. The Court also acknowledged that the State might properly require that the challenged taxes be paid under protest, or that refund claims be filed within a specified period of time. *Id.* at 45. In other

<sup>7</sup> The Court explained that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation hearing." 496 U.S. at 38 n.21.

words, "a State need not provide [a] predeprivation process for the exaction of taxes." *Id.* at 37 (footnote omitted).<sup>8</sup> To be meaningful—and constitutionally sufficient—however, the taxpayer's remedy must be "clear and certain." *Id.* at 39 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.)).

The State of Georgia's statutory scheme comports with the procedural requirements explicated by the Court in *McKesson*. Section 48-2-35(a) of the Official Code of Georgia Annotated states:

A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner.

GA. CODE ANN. § 48-2-35(a) (1991 and 1993 Supp.). The taxpayers here would seem to be indisputably entitled to seek refunds under this statute. This case is before the Court, however, because the court below found the statute inapposite and further found that Georgia law provided a constitutionally sufficient predeprivation remedy. That predeprivation remedy, however, was not even a glimmer in the State of Georgia's eyes until after the decision in *Harper* (three years after *McKesson* spelled out the need either for such a remedy or for meaningful backward-looking relief).

Indeed, when the court below considered the issue after the *Beam* decision, it simply stated that the refund statute

<sup>8</sup> Indeed, the Court explained in some detail why States could properly decide not to allow taxpayers to litigate their tax liabilities prior to payment: It could "threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *Id.* (footnote omitted).

"does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid" and then chimerically imposed a requirement that, in respect of unconstitutionally or otherwise invalid statutes, "a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim." *Reich v. Collins* (*Reich I*), 422 S.E.2d 846, 849 (Ga. 1992), reprinted at Appendix D to Charles J. Reich's Petition for a Writ of Certiorari to the Supreme Court of Georgia (App.), at App. 8D. Then, following *Beam*, the State discovered the applicability of Georgia's Administrative Procedure Act (APA) (GA. CODE ANN. § 50-13-12 (1990)) as well as Georgia's declaratory judgment provisions (*id.* §§ 9-4-1, *et seq.* (1982)), which it argued (and the court below held) satisfied *McKesson's* requirement of a predeprivation hearing. *Reich v. Collins* (*Reich II*), No. S92A0621 (Ga. Dec. 2, 1993), reprinted at Appendix A to Charles J. Reich's Petition for a Writ of Certiorari to the Supreme Court of Georgia (App.), at App. 4A-5A.

Even assuming that the Georgia APA procedure would not place the taxpayer under duress (thereby vitiating the supposed sufficiency of the predeprivation remedy), can such a patchwork—concocted by the State years after the taxes were paid—satisfy the requirement that the taxpayer's remedy be "clear and certain"? *Amicus* TEI submits that to pose the question is to answer it. The purpose of the Due Process Clause is to protect individual rights against arbitrary action by the government, but what is more arbitrary than inventing and interposing new requirements after the time for satisfying those requirements has passed?<sup>9</sup> The court below parsed the Georgia

<sup>9</sup> See *Reich II*, at App. 8A (Carley, J., with Sears-Collins, J., dissenting) ("nothing under the specific provisions of the state tax code can be said to have provided appellant with the opportunity for a constitutionally meaningful predeprivation challenge to his



refund statute, and studied the other provisions of the Georgia Code, not in search of principle or justice, but for a loophole. It sought not to implement the Court's mandate in *Beam, Davis and Harper*, but to obliterate it. That the court below's action might pass muster under federal due process principles truly beggars the imagination.<sup>10</sup>

#### IV.

*Amicus* TEI acknowledges that the Court is generally loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. But the discretion granted to the States in respect of remedying unconstitutional taxation has been repeatedly, albeit not universally, abused. Indeed, the actions of the court below, while regrettable, are hardly surprising. History is irrefutable: In the past decade, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution.

Two centuries ago, the Framers recognized the need for the federal courts to vigilantly safeguard rights against the parochialism of the States. In *The Federalist No. 80*, Alexander Hamilton used the example of claims to land

payment of taxes pursuant to the unconstitutional provisions of [the Georgia tax code]."; *id.* at App. 13A-14A (Carley, J., with Sears-Collins, J., dissenting) ("... I believe that appellant's payment of the unconstitutional taxes was not made 'voluntarily,' but was made under 'duress.' I believe, therefore, that the majority opinion erroneously 'confine[s] [appellant] to a lesser remedy' than that which federal due process demands.") (citation omitted, and bracketed material added by Justice Carley).

<sup>10</sup> See *McKesson*, 496 U.S. at 39 (if a tax is beyond the State's power to impose, the State has no choice but to "undo" the unlawful deprivation by making refunds "because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" (quoting *Ward v. Board of Comm'rs of Love County*, 253 U.S. 17, 24 (1920))).

under grants of different States to underscore the need for diversity jurisdiction:

The courts of neither of the granting states could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

THE FEDERALIST NO. 80, reprinted in II THE DEBATE ON THE CONSTITUTION 476, 479-80 (Library of America 1993). Justice Story elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816):

The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.<sup>11</sup>

See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948) (diversity jurisdiction was the product in part of "[t]he desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.").

To be sure, the insularity of the States has generally tempered over the years, and the concerns that led to the development of diversity jurisdiction are not wholly present here. (Indeed, although many of the cases coming before the Court in recent years have involved the Commerce Clause rights of out-of-state businesses, here it is

<sup>11</sup> See THE FEDERALIST NO. 81 (Alexander Hamilton), reprinted in II THE DEBATE ON THE CONSTITUTION, *supra*, 483, 487-88 ("The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . .").

the citizens of the State—albeit ones formerly employed by the Federal Government—who are denied their rights.) Nevertheless, the principle remains the same: the Court “cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.” *Chapman v. California*, 386 U.S. 18, 21 (1967) (emphasis added).

*Amicus* TEI submits that it is time for the Court to end its willing suspension of disbelief concerning the States’ ability and willingness to flout the constitutional rights of taxpayers. Concededly, not all States have persisted in interpreting this Court’s holdings (and their own statutes) to deny meaningful relief to aggrieved taxpayers. For example, on April 1, 1994, the Supreme Court of Minnesota finally effectuated this Court’s 1983 decision in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), by ordering refunds paid to banks that had paid taxes on income from federal obligations under a state statute that violated the Supremacy Clause and 31 U.S.C. § 3124 (1983). *Cambridge State Bank v. James*, No. CO-89-2097, 1994 Minn. LEXIS 241 (Minn. Apr. 1, 1994), on remand from *Norwest Bank Duluth v. McClung*, 113 S. Ct. 3026 (1993), vacating and remanding *Cambridge State Bank v. James*, 480 N.W.2d 647 (Minn. 1992). Holding that Minnesota’s taxing scheme did not provide a clear and certain predeprivation remedy, the Minnesota court concluded that the banks were entitled to refunds of the unconstitutional tax on interest earned on federal obligations. 1994 Minn. LEXIS 241, at \*21-\*23. See *id.* at \*25-\*26 (Page, J., concurring specially) (refunds should be ordered, without analysis of adequacy of any predeprivation remedy, under refund statute in existence at the time the taxes were paid; that statute provided “[n]otwithstanding any other provision of law to the contrary, in the case of any overpayment the commissioner \* \* \* shall refund any balance of more than one dollar \* \* \* if the taxpayer shall so request.”) (ellipses added by Justice Page).

Notwithstanding the Minnesota court’s eventual decision in *Cambridge State Bank* to order refunds, the question remains why the State’s implementation of this Court’s decision in *Memphis Bank* took more than a decade. The axiom *Justice delayed is justice denied* takes on even greater poignancy in the instant case where the taxpayer is a retiree.<sup>12</sup>

Unless the Court orders meaningful relief in this and similar cases, the States will continue to have an incentive to enact unconstitutional statutes—to “roll the dice” with the constitutional rights of taxpayers, knowing that—at worst—they may have to mend their ways in the future.<sup>13</sup>

<sup>12</sup> On April 8, 1994—one week before Americans must file their federal income tax returns—the Commonwealth of Virginia gave the taxpayers in *Harper* its formal response to the Court’s decision in that case: a half decade after *Davis* confirmed that Virginia (and other States) had violated the constitutional rights of federal retirees, the Commonwealth said it would give the taxpayers fifty cents on the dollar, without interest, spread out over four years. See Peter Baker, Va. Offering Partial Tax Repayment: Federal Retirees Would Get Only Half, WASHINGTON POST A1, A13 (Apr. 9, 1994). Having lost in the Supreme Court of the United States, the Commonwealth engaged in a not-too-subtle game of intimidation and, perhaps, even abuse of process. Take it or leave it, Virginia essentially said about its half-hearted, half-a-loaf offer: If you don’t take it, we shall keep you tied up in court for as long as we can. Is that action not inconsistent with *Harper*’s mandate? Is that the proper vindication of constitutional rights by the State that gave the Nation Washington, Jefferson, Madison, and Monroe? Or is Virginia’s bullying tactic too clever by half? See *id.* at A13 (quoting Rose Musumeci, a 72 year-old federal retiree, as follows: “We paid in 100 percent. I just don’t think it’s right. I’m sure if the positions were reversed, Virginia would want 100 percent of the taxes.”).

<sup>13</sup> That the States’ approach in the cases invalidating state taxing schemes is driven more by their desire to avoid responsibility for their unconstitutional acts than by a reasonable interpretation of this Court’s decisions is perhaps best illustrated by a case in which the roles of taxpayers and the States on the retroactivity issue were reversed from what they typically have been. In *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251 (1992), the Court con-



The failure of the Court to accord taxpayers anything more than a pyrrhic victory would assuredly chill efforts to secure their constitutional rights.

In addition, the States' denial of refunds could disrupt the orderly administration of the tax laws in the States by encouraging taxpayers not to pay the suspect tax (rather than to pay the tax and then seek a refund that they may never receive). Indeed, the Georgia court's willingness to fabricate new procedural requirements—such as the taxpayer's having to sue under the Georgia APA or to pay their taxes under protest—could well throw the voluntary self-assessment tax system into disarray. To protect their rights, sophisticated taxpayers might well feel compelled to make *all* payments under protest (and then to file protective claims for refunds in respect of the entire amount), overburdening state revenue departments and ultimately

sidered whether two earlier decisions—*ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982)—should be overruled. Had those cases been overturned, the States would have been free to tax a larger share of the income of out-of-state businesses, and the Court invited briefs on whether any such overruling should be retroactive. Although the case would have involved the overruling of express and directly applicable Supreme Court precedent of less than ten years' duration (which itself relied on an unbroken chain of Supreme Court decisions dating back to 1875)—and notwithstanding the States' almost uniform resistance to retroactive holdings where taxing schemes have been invalidated—the State of Georgia and 28 other States, the District of Columbia, Guam, and the Virgin Islands filed a brief unabashedly arguing that “the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity.” See Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, at 16, *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251 (1992) (No. 91-615). Such an “accommodation,” however, which some States seem ready to carry over to the issue of remedy, seems completely untethered by principle or consistency.

the courts. The unwary, however, would likely find themselves deprived of any real remedy, possibly undermining their trust in the fairness and integrity of the system. Thus, while a requirement of paying under protest might be constitutionally palatable on a going-forward basis (assuming the procedure is clear and certain), it could not help but undermine the efficiency and generally non-adversarial nature of the tax collection system.

## V.

The States have it within their power to enact constitutional tax statutes. What is more, they have authority to address any revenue shortfall produced by providing taxpayers with a meaningful remedy: They can levy and collect taxes equal to the amount of any refunds. The question is whether the fiscal hole is to be filled through constitutional or unconstitutional means.

This is not to say that the equities should never play a role in the fashioning of remedies. See *Beam*, 111 S. Ct. at 2448; *Harper*, 113 S. Ct. at 2526 (Kennedy, J., with White, J., concurring in part and concurring in the judgment). But whether the issue is one of retroactivity or remedy, the equities here do not rest with the State. Clearly, the issue should not turn on whether the State had “counted on” the unconstitutionally collected taxes. If such an allegation of “hardship” were deemed sufficient to justify the refusal to grant refunds, the taxes collected under unconstitutional tax statutes would rarely, if ever, be refunded. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from a judgment ordering refunds of the unconstitutionally collected taxes. Under such an analysis, a different result generally obtains, for any “hardship” of which the States might complain is one of their own making—the result of their own unconstitutional acts.<sup>14</sup>

<sup>14</sup> With respect to the facts of the instant case, any claim of hardship rings especially hollow. After all, the State of Georgia just

For far too long, State after State has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the constitutional rights of taxpayers. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State should not be allowed to argue first that the decision should apply on a prospective-only basis, and then (when that argument fails under *Beam* and *Harper*) insist that, although retroactive, the decision does not necessitate refunds. The States should not be permitted to thwart the judgments of this Court by conjuring up one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance. Intransigence cannot be rewarded or ignored.

Half a decade has passed since the Court held laws like the State of Georgia's here to be unconstitutional. Half a decade. And still many States persist in keeping the unconstitutionally extracted taxes. Indeed, not only has the State of Georgia refused to refund the taxes unconstitutionally collected from federal retirees (five years after *Davis*), but the State has similarly refused to refund the taxes held to be unconstitutional in *McKesson* four years ago and in *Beam* three years ago (in which Georgia was directly involved). Moreover, the State of Washington has not yet refunded any of the monies collected under the taxing scheme struck down seven terms ago in *Tyler Pipe*, and some of the taxpayers involved in *Armco* a decade ago have yet to see a penny of the tax dollars the State of West Virginia unconstitutionally collected under the B&O tax. (Other taxpayers in West Virginia have settled their cases, for but a fraction of the amount at issue.)

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recently enacted a \$100-million tax cut for fiscal year 1994-1995, projecting a substantial seven-percent growth in revenues. See Joseph Spiers, *Tax-Cut Time for the States*, FORTUNE, Apr. 18, 1994, at 25.

Similarly, the taxpayer in *McKesson* settled its claim against the State of Florida for less than full value, while other affected taxpayers have recovered none of the taxes the State unconstitutionally collected—a full 10 years after *Bacchus*. Most recently, the Commonwealth of Virginia, whose efforts to apply *Davis* prospectively were cast aside in *Harper*, has thrown down the gauntlet, telling federal annuitants that unless they accept a fraction of what was unlawfully taken from them by September 15, 1994 (i.e., before the decision in this case is handed down), they had better plan on spending years in court. See Peter Baker, *Va. Offering Partial Tax Repayment: Federal Retirees Would Get Only Half*, WASHINGTON POST A1, A13 (Apr. 9, 1994); note 12 *supra*.

Too frequently, the States seem unwilling to abide by the rules and to face up to the consequences of their actions. Like the person who continually promises to reform but repeatedly fails, the word of the States should no longer be considered sufficient: They should be judged by their actions, and their actions should be found wanting. As the Court so forcefully, and rightfully, proclaimed in *Griffith v. Kentucky*: "The time for toleration has come to an end." 479 U.S. at 323.



**CONCLUSION**

For the foregoing reasons, the Court should reverse the decision of the Supreme Court of Georgia and order that a refund be made to the petitioner in this case.

Respectfully submitted,

**TIMOTHY J. McCORMALLY**

*Counsel of Record*

**MARY L. FAHEY**

**TAX EXECUTIVES INSTITUTE, INC.**

**1001 Pennsylvania Avenue, N.W.**

**Suite 320**

**Washington, D.C. 20004-2505**

**(202) 638-5601**

*Counsel for Amicus Curiae*

*Tax Executives Institute, Inc.*

April 15, 1994

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OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS, *et al.*

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On Writ of Certiorari to the  
Supreme Court of Georgia

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**BRIEF AMICI CURIAE OF THE NATIONAL  
ASSOCIATION OF RETIRED FEDERAL  
EMPLOYEES, THE MILITARY COALITION AND  
DESIGNATED FEDERAL RETIREES IN KANSAS,  
NEW YORK, ARIZONA, VIRGINIA AND WISCONSIN  
IN SUPPORT OF PETITIONER**

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MICHAEL J. KATOR \*  
STEPHEN Z. CHERTKOF  
KATOR, SCOTT & HELLER  
1275 K Street, N.W.  
Suite 950  
Washington, D.C. 20005-4006  
(202) 898-4800

\* Counsel of Record

(Additional Counsel Listed on Signature Page)

April 15, 1994

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

No. 93-908

CHARLES J. REICH,  
*Petitioner,*

v.

MARCUS E. COLLINS, *et al.*

On Writ of Certiorari to the  
Supreme Court of Georgia

**BRIEF AMICI CURIAE OF THE NATIONAL  
ASSOCIATION OF RETIRED FEDERAL  
EMPLOYEES, THE MILITARY COALITION AND  
DESIGNATED FEDERAL RETIREES IN KANSAS,  
NEW YORK, ARIZONA, VIRGINIA AND WISCONSIN  
IN SUPPORT OF PETITIONER**

The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin file this brief *amici curiae* in support of petitioner and urge this Court to reverse the decision of the Supreme Court of Georgia.

**INTEREST OF AMICI**

*Amici* are NARFE, the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin. NARFE is a not for profit corporation that is dedicated to serving and protecting the

interests of federal civil service retirees and the federal retirement systems. As more fully set out in its separate *amicus* brief in support of the petition for certiorari, NARFE and its members are vitally interested in the issue of taxpayers' entitlement to receive refunds of unconstitutional state taxation.

The Military Coalition is a voluntary association of 24 military-related organizations that was formed six years ago. See App. A at 1a-8a (providing a listing of its component organizations). Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. As more fully stated in its separate *amicus* brief in support of the petition for certiorari, the Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issues impacting upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States. It and the members of its constituent organizations are affected directly by the decision below.

The designated federal retirees in Kansas, New York, Arizona, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. See Appendix A at 8a-9a (listing individual class representatives). They, or litigants from their states, have previously appeared in this Court as parties seeking the same or similar relief.<sup>1</sup>

<sup>1</sup> Counsel for petitioner and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.

## STATEMENT

Over the past five Terms, this Court has considered and decided three landmark state taxation cases: *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); and *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993). In *McKesson*, this Court reaffirmed longstanding Due Process principles allowing states to exact taxes without providing predeprivation process, but requiring in such circumstances clear and certain postdeprivation remedies. 496 U.S. at 31. In *Beam*, this Court ruled that states could not, except perhaps in the most limited of circumstances, rely on nonretroactive decision-making to deny refunds of unconstitutionally exacted taxes. 111 S. Ct. at 2445. In *Harper*, this Court integrated the holdings in *McKesson* and *Beam*, and held that Virginia must apply *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), retroactively and that if the state did not have adequate predeprivation procedures or if it otherwise "prompted" taxpayers to pay their taxes and have their objections entertained thereafter, Due Process requires it to provide "meaningful backward-looking relief." 113 S. Ct. at 2519-20.

In addition to sharing a place in the pantheon of state taxation cases, these three tax cases share another less beneficent characteristic: in all of these cases, notwithstanding litigation consuming the better part of a decade, no court has ordered a refund of any of these concededly unconstitutional taxes.<sup>2</sup>

<sup>2</sup> The McKesson Corporation has been litigating its tax refund action since 1987, but has just recently settled for a partial refund. The litigation continues with other taxpayers. See State Tax Notes (Mar. 14, 1994) at 688. Similarly, the James B. Beam Distilling Co. has been in court since 1984, but, with the exception of its victory in this Court, it has been thwarted at every turn. See *James B. Beam Distilling Co. v. Georgia*, 437 S.E. 2d 782, 268 Ga.



This is not to say that every state court has had difficulty discerning the commands of *McKesson*, *Beam* and *Harper*. To the contrary, several state courts have addressed tax challenges in light of these authorities and have correctly determined that these cases required refunds. See, e.g., *Hagge v. Iowa Department of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993) (requiring refund of taxes because state did not provide meaningful predeprivation remedy); *Strelecki v. Oklahoma Tax Commission*, No. 77615 (Okla. Sept. 28, 1993) (WESTLAW 1993 WL 379008), *aff'd as modified on reh'g*, (Okla. Mar. 23, 1994) (WESTLAW 1994 WL 102224) (same); *Service Oil Inc. v. North Dakota*, 479 N.W. 2d 815, 821-22 (N. Dak. 1992) (same); *Cambridge State Bank v. James*, No. CO-89-2097 (Minn. Apr. 1, 1994) (WESTLAW 1994 WL 106516) (same); *Nevada v. Scotsman Mfg. Co., Inc.*, 109 Nev. 252, 849 P.2d 317 (1993) (same). But unfortunately, other courts, like the court below, have had trouble following the teachings of these cases. They have transformed state remedies into a shell game of now-you-see-it, now-you-don't and precedent into cheesecloth. See, e.g., *Bass v. South Carolina*, 414 S.E. 2d 110, 112, 307 S.C. 113 (1991), *vacated*, 113 S. Ct. 3025 (1993) (construing a statute providing a refund remedy for "any taxpayer [for] any license fee or tax imposed under [the taxation title]. . ." to reach only "license-type fees and taxes," *rev'd*, 113 S. Ct. 3025 (settled on remand)).<sup>3</sup>

609 (1993), *petition for cert. pend'g*, No. 93-1140. And notwithstanding their victory in this Court, the *Harper* plaintiffs are still meeting defeat at every turn in the Virginia state courts. See Letter Opinion, No. CL891080 (Cir. Ct. Alexandria City Jan. 7, 1994).

<sup>3</sup> See also Pet. App. A and D. The court below has expediently shuffled and reshuffled the remedies that supposedly are available to Georgia taxpayers. First, in dissolving the injunctive relief the federal retirees obtained for the 1988 taxes, the court below held that Georgia's refund statute was an adequate remedy at law. *Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E. 2d 74, 75 n.1 (1989). Then, when the federal retirees sought relief under the refund

*Amici* submit that this Court in *Harper* spoke with unmistakable clarity in holding that states that prompt taxpayers to pay their taxes before raising a challenge must provide taxpayers a clear and certain remedy for any unconstitutional exaction. Nonetheless, it appears that unless this Court reiterates its holding in *Harper* with painstaking detail and clarity, taxing authorities will continue to advance lame and contrived arguments to defeat or delay taxpayers' recoveries. *Amici* urge this Court to reverse the court below in bold and unequivocal terms.

### ARGUMENT

#### I. STATES THAT PROMPT TAXPAYERS TO PAY THEIR TAXES BEFORE CHALLENGING THE TAX'S VALIDITY MUST PROVIDE CLEAR AND CERTAIN POSTDEPRIVATION REMEDIES

In *Harper* this Court laid out with what seemed unmistakable clarity the calculus for determining whether states must provide taxpayers with postdeprivation remedies:

If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." On the other hand, if no such predeprivation remedy exists, "the

statute, the court below concluded that that statute did not apply. *Reich v. Collins*, 282 Ga. 625, 422 S.E.2d 846 (1992), *vacated*, 113 S. Ct. 3028 (1993). The court "[t]ook] this opportunity" to create an entirely new remedy: the federal retirees were only entitled to a refund if they had paid their taxes under protest. *Id.*, 282 Ga. at 629, 422 S.E.2d at 849. Now, after remand of this case and *Beam*, and without any mention of payment under protest, the court below assumed that the refund statute applies to the taxpayers in *Beam* (who do not have standing under that statute), 437 S.E. 2d at 784 n.3, but it does not apply to federal retirees (who indisputably would have standing under that statute).

Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

113 S. Ct. at 2519, quoting *McKesson*, 496 U.S. at 38 n.21 and 31.

This Court further explained that states that place taxpayers under "constitutionally significant duress" to pay before challenging the tax do not provide meaningful predeprivation remedies:

A State incurs this obligation [to provide meaningful backward-looking relief] when it "places a taxpayer under duress promptly to pay a tax when due and relegate him to a postpayment refund action in which he can challenge the tax's legality." A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before* their objections are entertained or resolved" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." Such limitations impose constitutionally significant "'duress'" because a tax payment rendered under these circumstances must be treated as an effort "to avoid financial sanctions or a seizure of real or personal property."

113 S. Ct. at 2519-20 n.10, quoting *McKesson*, 496 U.S. at 31, 38 and 38 n.10 (emphasis original).

There would seem to be very little wiggle room in this analysis. In determining a state's obligation to provide postdeprivation relief, the first question is whether the state provides any means by which a taxpayer can withhold payments yet still challenge the validity of the tax. If there is no predeprivation remedy, *e.g.*, if a state proscribes suits to enjoin the imposition of a tax and requires a taxpayer to pay his taxes before he can file suit

to challenge the tax's validity, then Due Process requires the state to provide clear and certain postdeprivation relief. *See, e.g.* Va. Code Ann. § 58.1-1831 (prohibiting injunctive suits in tax cases) and § 58.1-1825 (requiring payment of tax as a prerequisite to filing suit).

If state law does provide a predeprivation remedy, then the question is whether this predeprivation remedy is "meaningful" and "adequate." *Harper*, 113 S. Ct. at 2519 and 2520. The meaningfulness and adequacy of any predeprivation process turn on the clarity and certainty of that process<sup>4</sup> and the presence of "constitutionally significant duress," *i.e.*, "sanctions and summary remedies designed to prompt taxpayers to 'tender . . . payments *before* their objections are entertained or resolved.'" *Harper*, 113 S. Ct. at 2519 n.10, quoting *McKesson*, 496 U.S. at 38 (emphasis original).

#### A. True Predeprivation Remedies Are Rare

In *McKesson*, this Court identified two types of predeprivation process: "authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment" or "allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." 496 U.S. at 36-37. While this Court perhaps did not intend this list to be exhaustive, *Amici* submit that, at least in the context of unconstitutional taxation, these may well be the only possible ways to challenge a tax prior to paying it.

For example, in *Harper*, the Department of Taxation argued that it provided an administrative mechanism through which taxpayers could withhold their payments yet still challenge the taxation before the tax commis-

<sup>4</sup> The substantive command of Due Process is that the taxpayer be given a clear and certain remedy designed to prevent the deprivation from becoming permanent. *McKesson*, 496 U.S. at 40. Whether that opportunity is provided before or after the exaction of taxes, in either case it must be clear and certain to be constitutionally sufficient.



sioner. See *Harper v. Virginia Department of Taxation*, No. 91-794 Br. of Resp. at 46-47. It is the unusual administrative tribunal, however, that has the power to provide relief from unconstitutional taxation. See, e.g., *Strelecki*, 1993 WL 379008 at \*4 ("The [Tax] Commission *qua* administrative agency is powerless to strike down a statute for constitutional repugnancy."); *Flint River Mills v. Henry*, 234 Ga. 385, 386, 216 S.E.2d 895, 896-97 (1975) (same); *George v. Department of Natural Resources*, 250 Ga. 491, 492, 299 S.E.2d 556, 557 (1983) (same). Thus, in the case of unconstitutional taxation, unless the administrative agency has the power to invalidate the statute it is charged with enforcing, resort to an administrative agency is not a predeprivation remedy.<sup>5</sup>

Similarly, while declaratory and injunctive relief could constitute a predeprivation remedy, declaratory relief alone could not. For example, when taxpayers in Virginia have been able to obtain declaratory relief, they were still liable for the taxes that had accrued during the pendency of their challenge. See *Perkins v. Albemarle County*, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on reh'g*, 214 Va. 416, 200 S.E.2d 566 (1973) (refusing to refund taxes paid during pendency of challenge). Because declaratory relief by itself is merely prospective relief, it does not satisfy the requirements of federal law. *McKesson*, 496 U.S. at 31.

To constitute a predeprivation remedy, a procedure must provide the taxpayer the opportunity to obtain final

<sup>5</sup> The court below held that judicial review of the Tax Commissioner's administrative decision is available and that such review constitutes a predeprivation remedy. Pet. App. 5a. In order to obtain judicial review, however, a taxpayer must post a bond in an amount in excess of the tax in dispute. Accordingly, while the taxpayer is not deprived of the taxes that are due as a precondition to bringing suit, he is deprived of the cost and the security for the bond. Thus, because the bond requirement is simply a deprivation of a different order, judicial review of the administrative decision is not a predeprivation remedy.

relief from the taxation without having to endure a deprivation of property along the way. If a taxpayer must pay his taxes or post a bond or suffer a lien to be placed upon his property to secure relief, then he does not have a predeprivation remedy. See, e.g. O.C.G.A. § 48-6-38 (requiring bond for double the amount of tax in dispute). In all such circumstances, Due Process requires the states to provide meaningful backward-looking relief.

#### **B. Only Predeprivation Remedies That Are Clear and Certain and Free of Duress Are Constitutionally Sufficient**

It is not enough, of course, that a state may provide a predeprivation remedy to its taxpayers. In order to be absolved of the constitutional obligation to provide "meaningful backward-looking relief," a state must provide meaningful and adequate predeprivation process. *Harper*, 113 S. Ct. at 2519-20. To meet this test, a predeprivation remedy must be clearly available to the taxpayers, it must provide a certainty of relief, and it must be free of "constitutionally significant duress." *Id.*

The clarity of any remedy must be determined from the perspective of the taxpayer. A state's remedial procedures must be sufficiently straightforward and apparent that a reasonable taxpayer would be able to discern the necessary steps. That is, if a state designs a Rube Goldberg remedial scheme that requires the taxpayer to proceed in different forums seeking piecemeal relief, and that method can only be discerned with hindsight, then it has not created a "clear" predeprivation remedy. See, e.g., *Cambridge State Bank v. James*, slip op. at 9-10 (because avenue for challenging the tax prior to payment was discernible only with hindsight, "this mechanism [did not] provide[] the 'meaningful opportunity' called for by *McKesson*.").

The second component to clarity focuses on the existence of the predeprivation remedy within the state's entire



remedial scheme. If a state has multiple remedies simultaneously available, its remedial scheme as a whole becomes unclear if the state closes off a remedy once the taxpayer has elected that particular route. That is, if a state has a cumbersome but valid predeprivation remedy and an attractive refund statute, the predeprivation remedy is unclear within the entire remedial scheme if the state entices taxpayers to pursue the postdeprivation refund remedy and then eliminates that remedy. The state's remedial scheme does not pass constitutional muster just because, in hindsight, there was a remedy that the state did not eliminate.

The certainty inquiry focuses not on the taxpayer, but instead on the relief available under any predeprivation procedure. The taxpayer must be *entitled* to be heard on the merits of his challenge to the validity of the tax. If the court has the discretion whether to entertain the challenge, as is common in declaratory and injunctive proceedings<sup>8</sup> then the taxpayer cannot be certain that he will be heard. And, of course, if the tribunal has the discretion to deny relief notwithstanding the determined invalidity of the tax, then the remedy is uncertain. See, e.g., Ariz. Rev. Stat. Ann. § 35-196.03 (requiring legislative appropriation to refund judicially invalidated taxes.) A remedy is certain only if the taxpayer is *entitled* to be heard and *entitled* to avoid the taxation if he persuades the tribunal that the tax is invalid.

Finally, even a clear and certain predeprivation remedy is constitutionally inadequate if the taxpayer is subject to "constitutionally significant duress." *Harper*, 113 S. Ct. at 2519-20 n.10. For example, even though the taxpayer

<sup>8</sup> See, e.g., *Collins v. Waldron*, 259 Ga. at 583, 385 S.E. 2d at 75 n.1 (refusing jurisdiction over action for declaratory and injunctive relief on grounds that there was an adequate remedy at law); *Haughton v. Lankford*, 189 Va. 183, 198, 52 S.E. 2d 111, 117 (1949) (courts should be slow to accept jurisdiction for declaratory and injunctive relief in tax cases).

in *Service Oil Co.* had available declaratory and injunctive relief, the court held that North Dakota was required to provide meaningful backward-looking relief. Because the taxpayer was not immune from the imposition of sanctions and penalties and because the state had summary remedies available to collect the taxes in dispute, the availability of declaratory and injunctive relief was insufficient to satisfy the requirements of Due Process. *Service Oil Inc.*, 479 N.W.2d at 821-22. See also *Hagge*, 504 N.W.2d at 451 (putative availability of declaratory and injunctive relief did not relieve state of requirement to provide postdeprivation relief.)

A tax scheme that imposes the risk of "financial [or criminal] sanctions or a seizure of real or personal property" on any taxpayer who pursues a predeprivation remedy is not constitutionally adequate. *Harper*, 113 S. Ct. at 2519-20 n.10. A taxpayer is subject to "constitutionally significant duress" when the state imposes penalties on him if he mounts an unsuccessful challenge to the validity of his taxes. *McKesson*, 496 U.S. at 38, n.21; *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286-87 (1912). What happens to taxpayers who *successfully* challenge a tax is irrelevant to the issue of duress; the test centers on the *risks* faced by taxpayers who challenge a tax and lose:

As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of the opinion that it was not called upon to *take the risk* of having its contracts disputed and its business injured, and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of the opinion that the payment was made under duress.

*Atchison*, 223 U.S. at 286-87 (emphasis added).

As this Court recognized in *Atchison*, the critical inquiry is whether the taxpayer who withholds payment is on reasonably equal ground when determining whether to pay



or challenge the assessment of taxes. *Atchison*, 223 U.S. at 286. The existence of statutory sanctions and summary collection procedures, including penalties, extramarket interest, and the placement of liens on delinquent taxpayers' property, all serve to tilt the playing field in favor of paying first. If a taxpayer will be charged interest on his underpaid tax three times what he could have earned if he put the money in a bank, he is economically prompted to pay the tax rather than withhold it. If he is subject to statutory penalties including fines and attachment, he is impelled to pay his taxes rather than risk further exposure.

Indeed, when there is an ostensibly available refund remedy at the time the taxes are paid,<sup>7</sup> not only are taxpayers prompted by the penalties but they are further enticed by the apparent ease and safety of the refund remedy to pay first and argue later. The very purpose of imposing penalties for underpayment and providing simple refund remedies for overpayment is to facilitate revenue collection efforts by prompting the payment of all taxes allegedly due before any challenge is initiated. *McKesson*, 496 U.S. at 37; *George Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 379 (1993); E. Duffy, *J. Multistate Tax.*, "When Are Retroactive Refunds In State Litigation Available?", Vol. 2 (Mar.-Apr. 1992) 20, 20 & 24.

### C. The Essence of *Harper* and *McKesson*

After *Harper*, there can be no dispute as to the requirements of federal law: if a state does not provide taxpayers an adequate predeprivation remedy, then it must provide them "meaningful backward-looking relief." A state that imposes financial sanctions against taxpayers to prompt them to pay their taxes when due does not provide ade-

<sup>7</sup> See, e.g., O.C.G.A. § 48-2-35 (Georgia refund statute); Va. Code Ann. §§ 58.1-1825 and 58.1-1826 (Virginia refund statutes).

quate predeprivation remedies. These commands devolve into two simple inquiries:

Does the state provide a *definite* means, *discernible* by a reasonable taxpayer, for challenging the validity of a tax without first having to pay the tax or suffer some other deprivation?

If there is such a remedy, does the state *guarantee* the taxpayer that if he pursues this route, he will be immune from all criminal and economic sanctions, including penalties, liens, seizures of property, and above market interest, regardless of whether he prevails?

## II. NEITHER GEORGIA NOR ANY OTHER STATE STILL INVOLVED IN *DAVIS* LITIGATION PROVIDES ADEQUATE PREDEPRIVATION REMEDIES

### A. Georgia Does Not Provide Constitutionally Adequate Predeprivation Relief

Under this Court's prior holdings, the Georgia statutory framework does not provide a clear and certain predeprivation remedy free of duress. The decision below does not pass the tests described in Part I.C., *supra*.

At the outset, none of the putative predeprivation remedies identified by the court below are true predeprivation remedies. The court below held that Petitioner could have sought declaratory and injunctive relief prior to paying his taxes. The answer to this, however, is that Petitioner and other federal retirees did seek such relief and their efforts were spurned. See Pet. Br. at 1F-2F; *Collins v. Waldron*, 259 Ga. at 582-83, 385 S.E.2d at 74-75. Thus, because these taxpayers were unable to secure this relief, it cannot be said that their entitlement to this relief was definite or certain.

The other putative predeprivation remedies are similarly flawed. Administrative review is unavailing to taxpayers challenging unconstitutional taxation because the admin-

istrative tribunal is "powerless" to provide relief. *Flint River Mills v. Henry*, 234 Ga. at 386, 216 S.E.2d at 896-97; *George v. Department of Natural Resources*, 250 Ga. at 492, 299 S.E.2d at 557. Because the affidavit of illegality route and the appeal from the notice of assessment route require the payment of tax or the posting of security, neither is a true predeprivation remedy. O.C.G.A. § 48-2-59(c).

Moreover, Georgia's remedial scheme as a whole is insufficiently clear because the rules are in constant flux. The state provided an ostensibly controlling statutory refund remedy, O.C.G.A. § 48-2-35:

A taxpayer shall be refunded *any and all taxes* or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, . . .

(emphasis added). And, in related *Davis* litigation, the court below denied declaratory and injunctive relief to the retirees on the ground that the refund statute provided an adequate remedy at law. *Collins v. Waldron*, 259 Ga. at 583, 385 S.E.2d at 75 n.1. Nonetheless, in its initial decision in this case, the court below held that the refund statute applied only to taxes "erroneously or illegally assessed and collect[ed] . . . under a *valid* law," and not to taxes erroneously or illegally collected under invalid state laws. Pet. App. 8D (emphasis added). The court below then created a wholly unprecedented pay under protest requirement that blocked the *Davis* litigants from receiving any relief, even though there was no possible way that any Georgia citizen could have foreseen such a requirement at the time these taxes were due. Such judicial legerdemain transforms the tax landscape into quicksand, where seemingly firm ground slips away as soon as a taxpayer takes a step. Due Process demands that taxpayers be given more certain footing.

As described in detail in Part I of Petitioner's Brief, Georgia does not provide adequate predeprivation relief because it does not *guarantee* immunity from its statutory "'sanctions and summary remedies designed' to prompt taxpayers to 'tender . . . payment before their objections are entertained or resolved. . . .'"\* These sanctions and summary remedies do not make the Georgia tax scheme invalid *per se*, but they do compel Georgia to provide meaningful backward-looking relief in addition to any other remedies it may offer.

Georgia imposes significant penalties on a taxpayer who unsuccessfully challenges a tax prior to payment. These penalties include above market rates of interest, financial sanctions, liens and criminal penalties. Georgia law makes nonpayment of taxes a misdemeanor crime, O.C.G.A. § 48-7-2<sup>9</sup> (no willfulness necessary), and subject to imprisonment if nonpayment is willful. O.C.G.A. § 48-7-127(c). There is no provision in Georgia law to exempt taxpayers from these statutes while a challenge is pending. Indeed, just the opposite is true because Georgia law imposes a duty on "all tax collectors, tax commissioners, sheriffs and constables to make sure that all persons violating any tax laws of [Georgia] are prosecuted for all such violations." O.C.G.A. § 48-2-81.

In addition to criminal penalties, Georgia imposes financial sanctions against a would-be prepayment challenger. An unsuccessful challenger is subject to a penalty of up to 25% of the tax, plus interest at the rate of 1% per month. O.C.G.A. §§ 48-7-86, 48-2-40. This interest rate is well above the market rate of interest. The cumulative effect of a 25% penalty and an above market interest rate since April 1989 means that Petitioner may have his tax nearly doubled if this case is not resolved in his favor.

\* *Harper*, 113 S. Ct. at 2519 n.10 (citations omitted).

<sup>9</sup> Relevant Georgia statutes are set out in Pet. App. G.



This risk is constitutionally significant duress. *Atchison*, 223 U.S. at 286.

Georgia has other procedures designed to prompt taxpayers to pay the tax prior to any challenge. Prepayment challengers are subject to garnishment, levy, attachment and liens. O.C.G.A. §§ 48-2-55, 48-2-56. Although these remedies are discretionary, there is no provision in Georgia law that automatically stays any of these summary remedies pending the outcome of a tax challenge. As this Court held in *Atchison*, a taxpayer cannot be forced to risk imposition of any of these penalties just to have his day in court. 223 U.S. at 286-87. See also *Hagge*, 504 N.W.2d at 451 (holding that because Iowa imposed penalties for nonpayment of taxes and created a statutory lien against delinquent taxpayers' property, the taxes were paid under duress and the state was thus constitutionally obligated to provide taxpayers a postdeprivation remedy); *Service Oil Inc.*, 479 N.W.2d at 821-22 (holding that the risk of imposition of penalties up to 5% of the tax due plus interest at the rate of one percent per month rendered North Dakota's provisions constitutionally inadequate). Because there is no guarantee that such summary collection remedies will be stayed during the pendency of a challenge, Georgia is constitutionally required to provide meaningful backward-looking relief.

#### B. Virginia Does Not Provide Constitutionally Adequate Predeprivation Relief

On remand from this Court in *Harper*, the trial court held that declaratory relief is an available and adequate predeprivation remedy. *Harper*, Letter Opinion at 2. However, declaratory relief is anything but a *definite* means to secure prepayment relief; indeed, standing by itself, declaratory relief is only prospective relief, not predeprivation relief.

Declaratory relief for unconstitutional taxation is not "certain" in Virginia because a taxpayer has no entitle-

ment to have his claim heard on the merits; *i.e.*, irrespective of the validity of his arguments, he may still be denied relief. This is so because jurisdiction in declaratory judgment actions is discretionary and indeed disfavored in tax cases:

[W]hile the courts have reasonable discretion in determining whether to exercise jurisdiction in declaratory judgment proceedings, *cases involving questions of tax liability should be scrutinized with care* to the end that the due and orderly administration of the State's fiscal affairs be not unduly interfered with.

*Haughton v. Lankford*, 189 Va. 183, 198, 52 S.E. 2d 111, 117 (1949) (emphasis added). See also *Chaffinch v. Chesapeake & Potomac Tel. Co. of Va.*, 227 Va. 68, 72, 313 S.E. 2d 376, 378 (1984) (trial court has broad discretion to decline jurisdiction of declaratory judgment, especially where other remedies exist), quoting *American Nat. Bank v. Kushner*, 162 Va. 378, 386, 174 S.E. 777, 780 (1934); *Liberty Mutual Insurance Co. v. Bishop*, 211 Va. 414, 421, 177 S.E. 2d 519, 524 (1970) ("[T]he power to make a declaratory judgment is a discretionary one and must be exercised with care and caution. It will not as a rule be exercised where some other mode of proceeding is provided."). Because taxpayers have no *definite* entitlement to declaratory relief in tax cases, the declaratory judgment route in Virginia is too uncertain to be constitutionally adequate.

More fundamentally, Virginia's declaratory judgment action provides neither pre- nor post-deprivation relief. This is most aptly demonstrated in *Perkins v. Albemarle County*, 214 Va. 240, 198 S.E. 2d 626, *aff'd and modified on reh'g*, 214 Va. 416, 200 S.E. 2d 566. *Perkins* is the extremely rare Virginia tax case where the taxpayer was able to secure a declaration that a taxing scheme was unconstitutional. Yet declaratory relief did not relieve the taxpayers of their obligation to pay the taxes during the pendency of the suit. Indeed, on rehearing, the Virginia

Supreme Court vacated its prior holding that the taxing authority had to *refund* the taxes paid. 214 Va. at 419, 200 S.E. 2d at 569. The fact that refunds were even at issue demonstrates that the taxpayers obtained no *predeprivation* relief. Thus, *Perkins* establishes that declaratory relief yields neither *predeprivation* relief nor *postdeprivation* relief, but instead only *prospective* relief. Prospective relief alone, however, does not satisfy the requirements of federal law. *McKesson*, 496 U.S. at 31.<sup>10</sup>

Moreover, a Virginia taxpayer who fails to pay taxes is subject to a variety of sanctions. Most significantly, the state imposes financial sanctions equal to a maximum of 30% of the tax due plus above market interest at the rate of 12% per annum. Va. Code Ann. §§ 58.1-351; 58.1-15.<sup>11</sup> Thus, a taxpayer who would have sought to pursue administrative remedies for 1988 taxes imposed on his federal annuity would now be facing a potential 90% increase in his liability if his challenge is unsuccessful. Indeed, this is precisely the approach taken by the Virginia Department of Taxation. See *Individual Income Tax Private Ruling Letter* (Va. Tax Comm. Aug. 24, 1989) (WESTLAW 1989 WL 266209) (refusing to waive penalty and interest assessed against federal retiree who did not pay income tax on his 1988 federal pension). This is constitutionally significant duress under *Atchison* and, accordingly, Due Process requires Virginia to provide a meaningful backward-looking remedy.

<sup>10</sup> It is indeed ironic that Virginia would contend that the appropriate means to challenge the constitutionality of a tax is to refuse to pay that tax and seek a declaratory judgment. This argument would render the anti-injunction provision of § 58.1-1831 meaningless: a taxpayer would never need an injunction to restrain the assessment or collection of any tax. Rather, he could merely refuse to pay the tax. This, however, would impermissibly "permit one aggrieved by an assessment to nullify the statutory method of procedure." *Todd v. County of Elizabeth City*, 191 Va. 52, 60 S.E. 2d 23, 25 (1950).

<sup>11</sup> The relevant state statutes are located in Appendices B-F.

Under § 58.1-1805, irrespective of whether the taxpayer may have filed an application for correction of the assessment, the Tax Commissioner may file a memorandum of lien at any time beyond thirty days after taxes, penalties and interest become due. This lien on the taxpayer's property is itself a constitutionally cognizable deprivation. See *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988) ("[T]he lien encumbered the property and impaired appellant's ability to mortgage or alienate it; and state procedures for creating and enforcing such liens are subject to the strictures of due process."). The threat of a lien is yet another form of duress which prompts payment of the tax.

Despite its success on remand to the trial court, Virginia is wrong in its assertion that Virginia has adequate *predeprivation* procedures. The sanctions and penalties outlined above apply notwithstanding the putative ability to bring a prepayment challenge to the validity of a tax. That is constitutionally significant duress.

#### C. New York Does Not Provide Constitutionally Adequate *Predeprivation* Relief

New York does not have even the semblance of a *predeprivation* remedy. Instead, taxpayers in New York are required to pay the tax as a condition precedent to challenging the validity of the tax. *In the Matter of the Petition of Donal A. Meyers*, N.Y. Tax Rep. ¶ 401-124 (CCH) (Tax App. Tribunal, June 3, 1993) (penalties for failure to prepay income tax are summarily assessed). Consistent with existing New York law, the *Davis* litigants in New York were required to pay their taxes prior to litigating their challenge. Accordingly, New York fails the first aspect of the test described in Part I.C., *supra*.

In addition, the state may issue a warrant for the collection of a tax at any time that it believes the collection of a tax is in jeopardy. N.Y. Tax Law § 692(c) (McKinney 1993). This warrant entitles the state to levy and sell the taxpayer's real and personal property. *Id.*



Furthermore, New York law expressly authorizes the state to issue an assessment and warrant "notwithstanding that an application for judicial review in respect of such deficiency has been duly made by the taxpayer. . . ." N.Y. Tax Law § 690(c). The only way a taxpayer can escape is to pay the tax or to post a bond equal to the tax plus interest and penalties. *Id.*

As in Georgia and Virginia, declaratory and injunctive relief were neither available nor adequate remedies. Recognizing the purely prospective nature of declaratory relief, New York suggested that the taxpayers should have commenced a declaratory judgment action several months before they were retired and subject to the tax, *i.e.*, before they had standing to challenge the tax. Not only was injunctive relief unavailable because there was an existing remedy at law in the form of New York's refund statute (N.Y. Tax Law § 686), any taxpayer who sought an injunction and lost risked being subject to the penalties described above. Accordingly, New York law does not provide sufficient predeprivation relief, free of duress, to escape the constitutional requirement of a postdeprivation remedy.

#### **D. Kansas Does Not Provide Constitutionally Adequate Predeprivation Relief**

Like Georgia, Virginia and New York, Kansas imposes significant penalties on a taxpayer who chooses to challenge a tax prior to payment.

Kansas imposes financial penalties equal to 25% of the tax plus an above market interest rate of 18% per year. Kans. Stat. Ann. §§ 79-3228(b); 79-2968(a). In the nearly five years that this litigation has been pending, a taxpayer who withheld payment and lost a challenge would face paying the tax plus approximately 115% of the tax as a penalty. That is constitutionally significant duress. *Atchison*, 223 U.S. at 286.

In addition, the Kansas Secretary of Revenue may issue a warrant 60 days after the tax becomes due "command-

ing the sheriff to levy upon and sell the real and personal property of the taxpayer . . . for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant. . . ." Kan. Stat. Ann. § 79-3235. Whether or not the warrant is executed, it is filed and becomes a "lien upon the title to and interest in the real property of the taxpayer. . . ." *Id.* Such a lien, standing alone, is a constitutionally significant deprivation of property. *Peralta*, 485 U.S. at 85.

As in the other states, injunctive relief was not available. Kansas law allows tax collection to be enjoined only where there is fraud, corruption or lack of state statutory authority. *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 234, 436 P.2d 982 (1968); *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 552, 557-60, 857 P.2d 666 (1993). Kansas successfully argued within the context of the *Davis* litigation itself that injunctive relief was not available because the taxes were collected pursuant to duly enacted statutes, and were therefore not subject to be enjoined on the basis of fraud, corruption, or lack of state statutory authority. *Barker v. Kansas*, 89-CV-666 and 89-CV-1100 (Dist. Ct. Shawnee County, Kansas, Memorandum Decision and Order, January 28, 1994) (denying the request of federal retirees for injunctive relief against a tax the court had already struck down).

Kansas also resembles the other states in that collection efforts and financial penalties may proceed during the pendency of a challenge. Kan. Stat. Ann. §§ 60-907(a); 60-1701 *et seq.* In addition, a warrant would ordinarily be filed before the taxpayer receives notice or opportunity to be heard on the matter, and the automatic lien created therein is itself a deprivation. *Peralta*, 485 U.S. at 85.

In sum, Kansas has created a statutory framework which does not provide sufficient predeprivation relief, free of duress, to escape the constitutional requirement of a postdeprivation remedy.



### E. Wisconsin Does Not Provide Constitutionally Adequate Predeprivation Relief

Like Georgia, Virginia, New York and Kansas, Wisconsin imposes significant penalties on taxpayers who would seek to challenge a tax prior to payment.<sup>12</sup>

Wisconsin imposes, *inter alia*, interest on delinquent taxes at the rate of 18% per year. Wis. Stat. § 71.82(2). The statutory scheme also provides for a range of penalties equal to 25% of the tax. See Wis. Stat. § 71.83 (enumerating several different penalties). Moreover, an objective good faith belief that a tax is unconstitutional is no defense to the imposition of such penalties. See, e.g., *Hennick v. Wisconsin Dept. of Revenue*, [1986-1990 Transfer Binder—New Matters] Wis. Tax Rep. ¶ 203-095 (CCH) (Wis. Tax Appeals Comm'n. Oct. 12, 1989). Wisconsin law also imposes a Delinquent Tax Collection Fee. This fee is equal to the greater of \$25 or 4½% of the total amount of the tax, interest and penalty remaining unpaid. 78 Wisconsin Tax Bulletin 1 (July 1992).

In addition, any unpaid tax liability results in the automatic perfection of a lien on all of the taxpayer's property. Wis. Stat. § 71.91(4). Wisconsin law also authorizes the Department of Revenue to issue warrants for the levy and execution upon the property of any taxpayer to satisfy any unpaid overdue tax. Wis. Stat. § 71.91(5).<sup>13</sup>

At bottom, Wisconsin has created a comprehensive statutory scheme that "prompts" taxpayers to pay their taxes before their challenges are entertained.

<sup>12</sup> Declaratory and injunctive relief are unavailable in Wisconsin. *Hogan v. Musolf*, 163 Wis. 2d 1, 26, 471 N.W.2d 216 (1991), cert. den., 112 S. Ct. 867 (1992) ("[I]n tax matters, [i]njunctive relief is not a substitute for the administrative remedy . . . ." (citations omitted)).

<sup>13</sup> In addition to the comprehensive scheme of civil sanctions, Wisconsin vigorously pursues criminal sanctions. See, e.g., *Criminal Enforcement Activities*, 76 Wisconsin Tax Bulletin 3 (April 1992).

### F. Arizona Does Not Provide Constitutionally Adequate Predeprivation Relief

Arizona imposes both civil and criminal penalties to prompt payment of its taxes prior to a challenge. Among other sanctions, Arizona imposes financial penalties and above market interest for overdue taxes. Ariz. Rev. Stat. Ann. §§ 42-134 and 42-136. Arizona law also prohibits injunctions which interfere with the collection of its taxes. Ariz. Rev. Stat. Ann. § 42-124(B)(1). Criminal sanctions are also imposed. Ariz. Rev. Stat. Ann. § 42-137. Whatever remedies the state now claims exist, identifiable only through hindsight, Arizona law places its taxpayers at a "serious disadvantage". *McKesson*, 496 U.S. at 38 n.21. (citations omitted).

Arizona's own courts have recognized the coercive design of its statutory tax scheme:

These principles have pointed application to this tax statute in which obedience to the Act is exacted by authorizing punishment and penalties, and by such coercive measures as being adjudged a criminal and subjected to a fine or imprisonment, . . . ; having to pay a penalty of twenty percent added to the tax. . . .

*Duhamel v. State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252, 255 (1947). Accordingly, it is undisputed that Arizona taxpayers are prompted to pay first, and challenge later.

### CONCLUSION

For the foregoing reasons, the decision of the court below is unsustainable. Georgia does not provide definite and ascertainable routes for taxpayers to challenge taxation before payment. All the routes the court below identified as putative predeprivation remedies are flawed: either they are not true predeprivation remedies, or, because they are encumbered by penalties and sanctions, they are not meaningful or adequate remedies. This Court should reverse the court below and, in so doing, bring an end to the war of attrition many states are waging



against citizens who dedicated their working lives to service to this Nation.

Respectfully submitted,

MICHAEL J. KATOR \*  
STEPHEN Z. CHERTKOF  
KATOR, SCOTT & HELLER  
1275 K Street, N.W.  
Suite 950  
Washington, D.C. 20005-4006  
(202) 898-4800

ROBERT COSTELLO  
GIVNEY, ANTHONY &  
FLAHERTY, P.C.  
665 5th Avenue  
Second Floor  
New York, New York 10022  
(212) 688-5151

JOHN J. PHELAN, III  
JOHN J. PHELAN, III, P.C.  
1414 Avenue of the Americas  
New York, New York 10019  
(212) 688-8088

EUGENE O. DUFFY  
O'NEIL, CANNON &  
HOLLMAN, S.C.  
Suite 1400  
111 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202  
(414) 276-5000

BRIAN A. LUSCHER  
BONN, LUSCHER, PADDEN &  
WILKINS, CHARTERED  
805 N. Second Street  
Phoenix, AZ 85004  
(602) 254-5557

\* Counsel of Record

April 15, 1994

MARK L. WEYMAN  
ROBERTO VELEZ  
ANDERSON, KILL, OLICK &  
OSHINSKY, P.C.  
666 Third Avenue  
New York, New York 10017  
(212) 850-9363

KENTON C. GRANGER  
RAYMOND L. DAHLBERT  
NIEWALD, WALDECK &  
BROWN, P.C.  
9401 Indian Creek Parkway  
Corporate Woods, Bldg. 40  
Suite 550  
Overland Park, KS 66225  
(913) 451-1717

JOHN C. FRIEDEN  
KEVIN M. FOWLER  
FRIEDEN, HAYNES & FORBES  
400 S.W. 8th, Suite 409  
Topeka, KS 66603  
(913) 232-7266

## **APPENDICES**



**APPENDIX A**

The following is a complete list of organizations and individuals appearing as amicus curiae in connection with this brief:

**MEMBERS OF THE MILITARY COALITION****THE RETIRED OFFICERS ASSOCIATION (TROA)**

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

**AIR FORCE ASSOCIATION (AFA)**

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

**AIR FORCE SERGEANTS ASSOCIATION (AFSA)**

The Air Force Sergeants Association was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

### **ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES (AMSUS)**

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

### **ASSOCIATION OF U.S. ARMY (AUSA)**

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

### **CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)**

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

### **COMMISSIONED OFFICERS ASSOCIATION OF THE U.S. PUBLIC HEALTH SERVICE, INC. (COA)**

The Commissioned Officers Association of the U.S. Public Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

### **ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE U.S. (EANGUS)**

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

### **FLEET RESERVE ASSOCIATION (FRA)**

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to represent its members on military personnel legislative matters before Congress.

### **MARINE CORPS LEAGUE (MCL)**

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organiza-



tion's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

#### **MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)**

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

#### **NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)**

The National Association for Uniformed Services/Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SMW membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

#### **NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)**

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

#### **NATIONAL MILITARY FAMILY ASSOCIATION (NMFA)**

The National Military Family Association was founded in 1969 and has approximately 10,000 members. Membership is open to active duty, retired and reserve component members of the seven uniformed services and their family members. The association's mission is to serve as an advocate for uniformed service families and to educate and inform them concerning issues affecting their lives.

#### **NAVAL ENLISTED RESERVE ASSOCIATION (NERA)**

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

#### **NAVAL RESERVE ASSOCIATION (NRA)**

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

#### **NAVY LEAGUE OF THE UNITED STATES (NLUS)**

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

### **NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NOCA)**

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organization operating under Texas Corporate Charter. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

### **RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES (ROA)**

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,000 members. The purpose of the association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

### **THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)**

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

### **THE MILITARY CHAPLAINS ASSOCIATION (MCA)**

The Military Chaplains Association was founded in 1925 and chartered by the 81st Congress in 1950. It has approximately 1,300 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

### **THE RETIRED ENLISTED ASSOCIATION (TREA)**

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

### **U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)**

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

### **U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)**

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and



benefits of all armed forces personnel and aid in Coast Guard recruiting.

#### ARIZONA

The litigants are the Estate of John L. Bohn, Shirley Bohn, Donald and Mary Rutan, Carl Linton, Arthur Abbott, who are retired federal employees, their estates or personal representatives, and, under the doctrine of virtual representation, the class of approximately 65,000 other retired federal employees, their estates and personal representatives. *Bohn v. Waddell*, No. 1 (A-TX, 94 — — (Ariz. Ct. App.) (Bohn II).

#### KANSAS AMICI

The petitioners in *Barker v. Kansas*, 112 S.Ct. 1619 (1992), *on remand*, Nos. 89-CV-666 and 89-CV-1100 (Dist Ct. Shawnee Cty., Kan., Div. IV), include:

KEYTON BARKER;	MARJORIE E. LOBER;
ROBERT W. CLAY;	ROGER J. OLSON;
BETTY J. CLAY;	NANCY W. OLSON;
ANTHONY E. CORCORAN;	ANDREW J. PEELE;
LELAND W. KEISTER, JR.;	JOHN G. FOWLER;
WILLIAM RICHARDS, SR.;	OLLUN E. RICHARDS;
PATRICIA K. KEISTER;	LONETA S. WILLIAMS;
LEONARD W. WILLIAMS;	EDWARD F. KELLOGG;
RENATA O. KELLOGG;	CLARENCE WOLF; and
WILLIAM J. LOBER, JR.;	FLORA B. WOLF,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 14,000 federal military retirees (and joint taxpayer spouses where applicable) who were subject to Kansas income taxation of federal military retired pay during one or more years from 1984 through 1991.

#### NEW YORK AMICI

The appellants in *Duffy v. Wetzler*, 555 N.Y.S.2d 543 (N.Y. Sup. Ct. 1990), *aff'd as modified*, 174 A.D.2d 253, 579 N.Y.S.2d (N.Y. App. Div.), *appeal dismissed*, 79 N.Y. 2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (N.Y. 1992), *cert. granted, vacated, and remanded*, 113 S.Ct.

3027 (1993), *on remand*, Nos. 90-07800 and 91-02056 (N.Y. Sup. Ct.), include:

EUGENE H. DUFFY;	FERNANDO S. MAURA;
ALICE G. DUFFY;	JAMES SWEEZY;
	ALICE SWEEZY;

on behalf of themselves and all others similarly situated.

#### VIRGINIA AMICI

The plaintiffs in *McClelland v. Payne*, No. 3:94CV211 (E.D.Va, Richmond Division), include:

JOHN F. MCCLELLAND;  
THOMAS B. WORSLEY; and  
CHRISTOPHER J. GIAIMO,

for themselves individually for all other similarly situated, as representatives on behalf of a putative class of approximately 185,000 similarly situated civilian and military annuitants of the federal government whose federal pensions were subject to taxation by Virginia.

#### WISCONSIN AMICI

J. Gerard Hogan, on behalf of himself and as representative of the certified taxpayer class in *Wisconsin Department of Revenue v. Hogan*, No. 93-CV-2549 *et al.*, *pet. for rev. pend'g*, Cir. Ct. Dane Cty.

## APPENDIX B

## Kan. Stat. Ann. § 79-3228 (1989)

## Penalty &amp; Interest for Underpayments

79-3228. Penalties and interest. (a) If any taxpayer, without intent to evade the tax imposed by this act, shall fail to file a return or pay the tax, if one is due, at the time required by or under the provisions of this act, but shall voluntarily file a correct return of income or pay the tax due within 60 days thereafter, there shall be added to the tax an additional amount equal to 10% of the unpaid balance of tax due plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was due until paid.

(b) If any taxpayer fails voluntarily to file a return or pay the tax, if one is due, within 60 days after the time required by or under the provisions of this act, there shall be added to the tax an additional amount equal to 25% of the unpaid balance of tax due plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was due until paid.

(c) If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and after notice from the director refuses or neglects within 20 days to file a proper return, the director shall determine the income of such taxpayer according to the best available information and assess the tax together with a penalty of 50% of the unpaid balance of tax due plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was originally due to the date of payment.

(d) Any person, who with fraudulent intent, fails to pay any tax or to make, render or sign any return, or to supply any information, within the time required by or under the provisions of this act, shall be assessed a penalty equal to the amount of the unpaid balance of tax due

plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was originally due to the date of payment. Such person shall also be guilty of a misdemeanor and shall, upon conviction, be fined not more than \$1,000 or be imprisoned in the county jail not less than 30 days nor more than one year, or both such fine and imprisonment.

(e) Any person who willfully signs a fraudulent return shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a term not exceeding five years. The term "person" as used in this section includes any agent of the taxpayer, and officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

(f) Whenever, in the judgment of the secretary or the secretary's designee, the failure of the taxpayer to comply with the provisions of subsections (a), (b) and (c) of this section, was due to reasonable causes, the secretary or the secretary's designee may waive or reduce any of the penalties upon making a record of the reasons therefor.

(g) In case of a nonresident or any officer or employee of a corporation, the failure to do any act required by or under the provisions of this act shall be deemed an act committed in part at the office of the director.

(h) In the case of a nonresident individual, partnership or corporation, the failure to do any act required by or under the provision of this act shall prohibit such nonresident from being awarded any contract for construction, reconstruction or maintenance or for the sale of materials and supplies to the state of Kansas or any political subdivision thereof until such time as such nonresident has fully complied with this act.

79.3229. Jeopardy assessments, when; procedures; closing of taxable period. Whenever the director of taxa-



tion has reason to believe that a taxpayer liable for tax under any provisions of article 32 of chapter 79 of the Kansas Statutes Annotated is about to depart from the state or to remove such taxpayer's property therefrom, or to conceal oneself or such taxpayer's property therein, or to do any other act tending to prejudice, jeopardize or render wholly or partly ineffectual the collection of such tax unless proceedings are brought without delay, the director shall immediately make an assessment for all such taxes due from such taxpayer, noting such finding on the assessment. Thereupon a warrant shall be issued for the collection of the tax as provided in K.S.A. 79-3235 and amendments thereto. The taxpayer may within 15 days from the date of filing of such warrant request a hearing by the director on the correctness of the jeopardy assessment. If the director finds that in certain cases, collection of the tax for the current year will be jeopardized by delay, the director may, in the exercise of discretion, declare the taxable period closed, and immediately issue notice and demand for payment of the tax found to be due. In such cases, collection may be stayed by giving such security as the director may consider adequate.

Orders under this section shall be rendered in accordance with the procedures for emergency adjudicative proceedings contained in K.S.A. 77-536 and amendments thereto. Hearings required under this section shall be conducted in accordance with the provisions of the Kansas administrative procedure act.

**Kan. Stat. Ann. § 79-2968 (1989)**  
**18% Underpayment Interest Rate**

79-2968. Rate of interest on delinquent or unpaid taxes. Except as otherwise specifically provided by law, whenever interest is charged under any law of this state upon any delinquent or unpaid taxes levied or imposed by the state of Kansas or any taxing subdivision thereof the rate thereof shall be: (a) One and one-half percent

per month if computed monthly; and (b) eighteen percent per annum if computed annually.

**Kan. Stat. Ann. § 3235 (1989)**  
**Summary Remedies/Distrain**

79-3235. Collection of delinquent taxes; tax lien. If any tax imposed by this act or any portion of such tax is not paid within 60 days after it becomes due, the secretary or the secretary's designee shall issue a warrant under the secretary's or the secretary's designee's hand and official seal, directed to the sheriff of any county of the state, commanding the sheriff to levy upon and sell the real and personal property of the taxpayer found within the sheriff's county for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant and to return the warrant to the secretary or the secretary's designee and pay to the secretary or the secretary's designee the money collected by virtue of it not more than 60 days from the date of the warrant. The sheriff, within five days after the receipt of the warrant, shall file with the clerk of the district court of the county a copy thereof, and thereupon the clerk shall either enter in the appearance docket the name of the taxpayer mentioned in the warrant, the amount of the tax or portion of it, interest and penalties for which the warrant is issued and the date such copy is filed and note the taxpayer's name in the general index. No fee shall be charged for either entry. The amount of such warrant so docketed shall thereupon become a lien upon the title to and interest in the real property of the taxpayer against whom it is issued. The sheriff shall proceed in the same manner and with the same effect as prescribed by law with respect to executions issued against property upon judgments of a court of record and shall be entitled to the same fees for services to be collected in the same manner.

The court in which the warrant is docketed shall have jurisdiction over all subsequent proceedings as fully as

though a judgment had been rendered in the court. In the discretion of the secretary or the secretary's designee a warrant of like terms, force and effect may be issued and directed to any officer or employee of the secretary, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, and the subsequent proceedings thereunder shall be the same as provided where the warrant is issued directly to the sheriff. The taxpayer shall have the right to redeem the real estate within a period of 18 months from the date of such sale. If a warrant is returned, unsatisfied in full, the secretary or the secretary's designee shall have the same remedies to enforce the claim for taxes as if the state of Kansas had recovered judgment against the taxpayer for the amount of the tax. No law exempting any goods and chattels, lands and tenements from forced sale under execution shall apply to a levy and sale under any such warrant or upon any execution issued upon any judgment rendered in any action for income taxes. The secretary or the secretary's designee shall have the right at any time after a warrant has been returned unsatisfied or satisfied only in part, to issue alias warrants until the full amount of the tax is collected.

**Kan. Stat. Ann. § 79-32,107 (Supp. 1993)**

**Penalties & Interest for Estimated Tax Underpayments**

79-82,107. Penalties and interest for noncompliance, when same not imposed for underpayments; failure of employer to deduct and withhold; failure to collect, account for and pay tax; attempts to evade or defeat tax, (a) All penalties and interest proscribed by K.S.A. 79-3068, and amendments thereto, for noncompliance with the income tax laws of Kansas shall be applicable for noncompliance with the provisions of the Kansas withholding and declaration of estimated tax not relating to withholding tax which shall be enforced in the same manner as the "Kansas income tax act." A penalty at the same rate per annum prescribed by subsection (h) of K.S.A.

79-2968, and amendments thereto, for interest upon delinquent or unpaid taxes shall be applied and added to a taxpayer's amount of underpayment of estimated tax due from the date the estimated tax payment was due until the same is paid or until the 15th day of the fourth month following the close of the taxable year for which such estimated tax is a credit, whichever date is earlier, but such penalty shall not be added if the total amount thereof does not exceed \$1. For purposes of this subsection, the amount of underpayment of estimated tax shall be the excess of the amount of the installment which would be required to be paid if the estimated tax were equal to 90% of the tax shown on the return for the taxable year or, if no return was filed, 90% of the tax for such year, over the amount, if any, of the installment paid on or before the last date prescribed for payment. Amounts due from any employer on account of withholding or from any taxpayer for estimated tax may be collected by the director in the manner provided for the collection of state income tax in K.S.A. 79-3235, and amendments thereto.

(b) No penalty or interest shall be imposed upon any individual with respect to any underpayment of any installment if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of such installment equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were whichever of the following is the least:

(1) The tax shown on the return of the individual for the preceding taxable year, if a return showing a liability for tax was filed by the individual for the preceding taxable year and such preceding year was a taxable year of 12 months;

(2) an amount equal to 66⅔%, in the case of individuals referred to in subsection (b) of K.S.A. 79-32,102, and amendments thereto, and 90%, in the case of



all other individuals, of the tax for the taxable year computed by placing on an annualized basis, pursuant to rules and regulations adopted by the secretary of revenue, the taxable income for the months in the taxable year ending before the month in which the installment is required to be made.

(c) No penalty or interest shall be imposed upon any corporation with respect to any underpayment of any installment of estimated tax if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of such installment equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were whichever of the following is the least:

(1) The tax shown on the return of the corporation for the preceding taxable year, if a return showing a liability for tax was filed by the corporation for the preceding taxable year and such preceding year was a taxable year of 12 months; or

(2)(A) an amount equal to 90% of the tax for the taxable year computed by placing on an annualized basis the taxable income; (i) For the first three months of the taxable year, in the case of the installment required to be paid in the fourth month; (ii) for the first three months or for the first five months of the taxable year, in the case of the installment required to be paid in the sixth month; (iii) for the first six months or for the first eight months of the taxable year in the case of the installment required to be paid in the ninth month; and (iv) for the first nine months or for the first 11 months of the taxable year, in the case of the installment required to be paid in the 12th month of the taxable year.

(B) For purposes of this subsection (2), the taxable income shall be placed on an annualized basis by (i) multiplying by 12 the taxable income referred to in subsection (2)(A), and (ii) dividing the resulting amount by the number of months in the taxable year (three, five,

six, eight, nine, or 11, as the case may be) referred to in subsection (2)(A).

(d) If the employer, in violation of the provisions of this act, fails to deduct and withhold under this chapter, and thereafter the tax against which such withholding may be credited is paid, the amount otherwise required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(e) Any person required to collect, truthfully account for, and pay over any tax imposed by this act, who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to the other penalties of this section be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

(f) In case of failure by any employer required by subsection (b) of K.S.A. 79-3298, and amendments thereto, to remit any amount of withheld taxes by the date prescribed therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be imposed upon such person a penalty of 15% of the amount of the underpayment. For purposes of this subsection, the term "underpayment" means the excess of the amount of the tax required to be withheld and remitted over the amount, if any, remitted on or before the date prescribed therefor. The failure to remit for any withholding period shall be deemed not to continue beyond the last date prescribed for filing the annual return as required by subsection (d) of K.S.A. 79-3298, and amendments thereto. Penalty and interest as prescribed by K.S.A. 79-3228, and amendments thereto, shall not begin to accrue under subsection (a)

of this section on the amount of any such underpayment until the due date of the annual return for the calendar year in which such failure to remit occurs.

# APPENDIX C

## N.Y. Tax Law § 607(a) (McKinney 1987)

### § 607. Meaning of terms.

(a) General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in the article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fiftyfour is clearly intended), and amendments thereto, and other provisions of the law of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

## N.Y. Tax Law § 659 (McKinney 1987)

### § 659. Report of federal changes, corrections or disallowances

If the amount of a taxpayer's federal taxable income, federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution or includible gain of a trust reported on his federal income tax return for any taxable year, or the amount of a taxpayer's credit for employment-related expenses set forth on such return, or the amount of any federal foreign tax credit affecting the calculation of the credit for Canadian provincial taxes under section six hundred twenty or six hundred twenty-A, is changed or corrected by the United States internal revenue service or other competent authority or as the result of a renegotiation of a contract or subcontract with the United States, or the amount an employer is required to deduct and withhold from wages



for federal income tax withholding purposes is changed or corrected by such service or authority or if a taxpayer's claim for credit or refund of federal income tax is disallowed in whole or in part, the taxpayer or employer shall report such change or correction in federal taxable income, federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution, includible gain of a trust, federal credit for employment-related expenses, federal foreign tax credit or federal income tax withholding or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous. The allowance of a tentative carryback adjustment based upon a net operating loss carryback pursuant to section sixty-four hundred eleven of the internal revenue code<sup>1</sup> shall be treated as a final determination for purposes of this section. Any taxpayer filing an amended federal income tax return and any employer filing an amended federal return of income tax withheld shall also file within ninety days thereafter an amended return under this article, and shall give such information as the commissioner may require. The commissioner may by regulation prescribe such exceptions to the requirements of this section as he or she deems appropriate. For purposes of this section, (i) the term "taxpayer" shall include a partnership having a resident partner or having any income derived from New York sources, and a corporation with respect to which the taxable year of such change, correction, disallowance or amendment is a year with respect to which the election provided for in subsection (a) of section six hundred sixty is in effect, and (ii) the term "federal income tax return" shall include the returns of income required under sections six thousand thirty-one<sup>2</sup> and six thousand thirty-

<sup>1</sup> 26 U.S.C.A. § 6411.

<sup>2</sup> 26 U.S.C.A. § 6031.

seven of the internal revenue code.<sup>3</sup> In the case of such a corporation, such report shall also include any change or correction of the taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code. Reports made under this section by a partnership or corporation shall indicate the portion of the change in each item of income, gain, loss or deduction (and, in the case of a corporation, of each change in, or disallowance of a claim for credit or refund of, a tax referred to in the preceding sentence) allocable to each partner or shareholder and shall set forth such identifying information with respect to such partner or shareholder as may be prescribed by the commissioner.

(As amended L.1988, c. 384, § 6; L.1990, c. 190, § 49.)

#### **N.Y. Tax Law § 659 (Supp. 1993)**

##### **§ 659. Report of federal changes, corrections or disallowances**

If the amount of a taxpayer's federal taxable income, federal items of tax preference or total taxable amount or ordinary income portion of a lump sum distribution reported on his federal income tax return for any taxable year, or the amount of a taxpayer's credit for employment-related expenses set forth on such return, or the amount of any federal foreign tax credit affecting the calculation of the credit for Canadian provincial taxes under section six hundred twenty or six hundred twenty-A, is changed or corrected by the United States internal revenue service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United States or the amount an employer is required to deduct and withhold from wages for federal income tax withholding purposes is changed or corrected by such service or authority or if a taxpayer's claim for credit or

<sup>3</sup> 26 U.S.C.A. § 6037.

refund of federal income tax is disallowed in whole or in part, the taxpayer or employer shall report such change or correction in federal taxable income, federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution, federal credit for employment-related expenses, federal foreign tax credit or federal income tax withholding or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the tax commission, and shall concede the accuracy of such determination or state wherein it is erroneous. The allowance of a tentative carryback adjustment based upon a net operating loss carryback pursuant to section sixty-four hundred eleven of the internal revenue code<sup>1</sup> shall be treated as a final determination for purposes of this section. Any taxpayer filing an amended federal income tax return and any employer filing an amended federal return of income tax withheld shall also file within ninety days thereafter an amended return under this article, and shall give such information as the tax commission may require. The tax commission may by regulation prescribe such exceptions to the requirements of this section as it deems appropriate.

(Added L.1960, c. 563, § 2; amended L.1970, c. 1005, § 21; L.1973, c. 449, § 2; L.1973, c. 526, § 1; L.1977, c. 59, § 6; L.1978, c. 607, § 10; L.1983, c. 15, § 36; L.1987, c. 28, § 89; L.1987, c. 274, § 5.)

#### **N.Y. Tax Law § 684 (McKinney 1993)**

##### **§ 684. Interest on underpayment**

(a) General.—If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the rate set by the tax commission pursuant to section six hundred ninety-

<sup>1</sup> For provisions of the internal revenue code, see 26 U.S.C.A.

seven, or if no rate is set, at the rate of six per cent per annum shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subsection shall not be paid if the amount thereof is less than one dollar. If the time for filing of a return of tax withheld by an employer is extended, the employer shall pay interest for the period for which the extension is granted and may not charge such interest to the employee.

(b) Exception as to estimated tax.—This section shall not apply to any failure to pay estimated tax.

(c) Exception for mathematical error.—No interest shall be imposed on any underpayment of tax due solely to mathematical error if the taxpayer files a return within the time prescribed in this article (including any extension of time) and pays the amount of underpayment within three months after the due date of such return, as it may be extended.

*[(d) Repealed.]*

(e) Suspension of interest on deficiencies.—If a waiver of restrictions on assessment of a deficiency has been filed by the taxpayer, and if notice and demand by the tax commission for payment of such deficiency is not made within thirty days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such thirtieth day and ending with the date of notice and demand.

(f) Tax reduced by carryback.—If the amount of tax for any taxable year is reduced by reason of a carryback of a net operating loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss arises. Such filing date shall be determined without regard to extensions of time to file.



(g) Interest treated as tax.—Interest under this section shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as income tax. Any reference in this article to the tax imposed by this article shall be deemed also to refer to interest imposed by this section on such tax.

(h) Interest on penalties or additions to tax.—Interest shall be imposed under subsection (a) in respect of any assessable penalty or addition to tax only if such assessable penalty or addition to tax is not paid within ten days from the date of the notice and demand therefor under subsection (b) of section six hundred ninety-two, and in such case interest shall be imposed only for the period from such date of the notice and demand to the date of payment.

(i) Payment prior to notice of deficiency.—If, prior to the mailing to the taxpayer of a notice of deficiency under subsection (b) of section six hundred eighty-one, the tax commission mails to the taxpayer a notice of proposed increase of tax and within thirty days after the date of the notice of proposed increase the taxpayer pays all amounts shown on the notice to be due to the tax commission, no interest under this section on the amount so paid shall be imposed for the period after the date of such notice of proposed increase.

(j) Payment within ninety days after notice of deficiency.—If a notice of deficiency under section six hundred eighty-one is mailed to the taxpayer, and the total amount specified in such notice is paid on or before the ninetieth day after the date of mailing, interest under this section shall not be imposed for the period after the date of the notice.

(k) Payment within ten days after notice and demand.—If notice and demand is made for payment of any amount under subsection (b) of section six hundred ninety-two, and if such amount is paid within ten days after the date of such notice and demand, interest under

this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(l) Limitation on assessment and collection.—Interest prescribed under this section may be assessed and collected at any time during the period within which the tax or other amount to which such interest relates may be assessed and collected, respectively.

(m) Interest on erroneous refund.—Any portion of tax or other amount which has been erroneously refunded, and which is recoverable by the tax commission, shall bear interest at the rate set by the tax commission pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six per cent per annum from the date of the payment of the refund, but only if it appears that any part of the refund was induced by fraud or a misrepresentation of a material fact.

(n) Satisfaction by credits.—If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

(Added L.1962, c. 1011, § 1; amended L.1971, c. 780, § 1; L.1983, c. 15, §§ 41, 80, 81; L.1985, c. 65, § 119.)

#### **N.Y. Tax Law § 634 (McKinney Supp. 1993)**

##### **§ 684. Interest on underpayment**

(a) General.—If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the rate set by the commissioner of taxation and finance pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six per cent per annum shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subsection shall not be paid if the amount thereof is less than one dollar. If the time for filing of a

return of tax withheld by an employer is extended, the employer shall pay interest for the period for which the extension is granted and may not charge such interest to the employee.

*[See main volume for text of (b) and (c)]*

(d) Suspension of interest on deficiencies.—If a waiver of restrictions on assessment of a deficiency has been filed by the taxpayer, and if notice and demand by the tax commission for payment of such deficiency is not made within thirty days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such thirtieth day and ending with the date of notice and demand.

(e) Tax reduced by carryback.—If the amount of tax for any taxable year is reduced by reason of a carryback of a net operating loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss arises. Such filing date shall be determined without regard to extensions of time to file.

(f) Interest treated as tax.—Interest under this section shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as income tax. Any reference in this article to the tax imposed by this article shall be deemed also to refer to interest imposed by this section on such tax.

(g) Interest on penalties or additions to tax.—Interest shall be imposed under subsection (a) in respect of any assessable penalty or addition to tax only if such assessable penalty or addition to tax is not paid within ten days from the date of the notice and demand therefor under subsection (b) of section six hundred ninety-two, and in such case interest shall be imposed only for the period from such date of the notice and demand to the date of payment.

(h) Payment within ten days after notice and demand.—If notice and demand is made for payment of any amount under subsection (b) of section six hundred ninety-two, and if such amount is paid within ten days after the date of such notice and demand, interest under this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(i) Limitation on assessment and collection.—Interest prescribed under this section may be assessed and collected at any time during the period within which the tax or other amount to which such interest relates may be assessed and collected, respectively.

(j) Interest on erroneous refund.—Any portion of tax or other amount which has been erroneously refunded, and which is recoverable by the commissioner of taxation and finance, shall bear interest at the rate set by the commissioner pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six per cent per annum from the date of the payment of the refund, but only if it appears that any part of the refund was induced by fraud or a misrepresentation of a material fact.

(k) Satisfaction by credits.—If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

(As amended L.1989, c. 61, §§ 117, 147.)

## **N.Y. Tax Law § 686(a) (McKinney 1987)**

### **§ 686. Overpayment**

(a) General.—The tax commission, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on



the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the tax commission and, as provided in sections one hundred seventy-one-c, one hundred seventy-one-d and one hundred seventy-one-e of this chapter, against past-due support and against the amount of a default in repayment of a guaranteed student, state university or city university loan. The balance shall be refunded by the comptroller out of the proceeds of the tax retained by him for such general purpose. Any refund under this section shall be made only upon the filing of a return and upon a certificate of the tax commission approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the return of the person who made the overpayment and other information and data available in the files of the tax commission.

**N.Y. Tax Law § 686(a) (Supp. 1993)**

**§ 686. Overpayment**

(a) General.—The commissioner of taxation and finance, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the commissioner of taxation and finance and, as provided in sections one hundred seventy-one-c, one hundred seventy-one-d, one hundred seventy-one-e and one hundred seventy-one-f of this chapter, against past-due support, a past-due legally enforceable debt, and against the amount of a default in repayment of a guaranteed student, state university or city university loan. The balance shall be refunded by the comptroller out of the proceeds of the tax

retained by him for such general purpose. Any refund under this section shall be made only upon the filing of a return and upon a certificate of the commissioner of taxation and finance approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the return of the person who made the overpayment and other information and data available in the files of the commissioner of taxation and finance.

*[See main volume for text of (b) to (h)]*

(As amended L.1992, c. 55, § 85.)

**N.Y. Tax Law § 687(c) (McKinney 1987)**

(c) Notice of federal change or correction.—A claim for credit or refund of any overpayment of tax attributable to a federal change or correction required to be reported pursuant to section six hundred fifty-nine shall be filed by the taxpayer within two years from the time the notice of such change or correction or such amended return was required to be filed with the tax commission. If the report or amended return required by section six hundred fifty-nine is not filed within the ninety day period therein specified, interest on any resulting refund or credit shall cease to accrue after such ninetieth day. The amount of such credit or refund shall not exceed the amount of the reduction in tax attributable to such federal change, correction or items amended on the taxpayer's amended federal income tax return. This subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection.

**N.L. Tax Law § 687(c) (Supp. 1987)**

**§ 687. Limitations on credit or refund**

*[See main volume for text of (a) and (b)]*

(c) Notice of federal change or correction.—A claim for credit or refund of any overpayment of tax attributable

to a federal change or correction required to be reported pursuant to section six hundred fifty-nine shall be filed by the taxpayer within two years from the time the notice of such change or correction or such amended return was required to be filed with the commissioner of taxation and finance. If the report or amended return required by section six hundred fifty-nine is not filed within the ninety day period therein specified, no interest shall be payable on any claim for credit or refund of the overpayment attributable to the federal change or correction. The amount of such credit or refund shall not exceed the amount of the reduction in tax attributable to such federal change, correction or items amended on the taxpayer's amended federal income tax return. This subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection.

*[See main volume for text of (d) to (k)]*

(As amended L.1989, c. 61, § 150.)

#### **N.Y. Tax Law § 690 (McKinney 1993)**

##### **§ 690. Review of tax commission decision**

(a) General.—A decision of the tax appeals tribunal shall be subject to judicial review in the manner provided for by section two thousand sixteen of this chapter.

(b) Judicial review exclusive remedy of taxpayer.—The review of a decision of the tax commission provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by this article.

(c) Assessment pending review; review bond.—Irrespective of any restrictions on the assessment and collection of deficiencies, the tax commission may assess a deficiency after the expiration of the period specified in subsection (a), notwithstanding that an application for

judicial review in respect of such deficiency has been duly made by the taxpayer, unless the taxpayer, at or before the time his application for review is made, has paid the deficiency, has deposited with the tax commission the amount of the deficiency, or has filed with the tax commission a bond (which may be a jeopardy bond under subsection (h) of section six hundred ninety-four) in the amount of the portion of the deficiency (including interest and other amounts) in respect of which the application for review is made and all costs and charges which may accrue against him in the prosecution of the proceeding, including costs of all appeals, and with surety approved by a justice of the supreme court of the state of New York, conditioned upon the payment of the deficiency (including interest and other amounts) as finally determined and such costs and charges. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the tax commission is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) Credit, refund or abatement after review.—If the amount of a deficiency determined by the tax commission is disallowed in whole or in part by the court of review, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if payment has not been made, shall be abated.

(e) Date of finality of division of tax appeals determination or decision.—A determination of an administrative law judge in the division of tax appeals shall become final in accordance with subdivision four of section two thousand ten of this chapter. A decision of the tax appeals tribunal shall become final upon the expiration of the period specified in subsection (a) for making an application for review, if no such application has been duly made within such time, or if such application has been duly made, upon expiration of the time for all further



judicial review, or upon the rendering by the tax appeals tribunal of a decision in accordance with the mandate of the court on review. Notwithstanding the foregoing, for the purpose of making an application for review, the decision of the tax appeals tribunal shall be deemed final on the date the notice of such decision is served as provided in section two thousand sixteen of this chapter.

(Added L.1962, c. 1011, § 1; amended L.1987, c. 401, § 8.)

**N.Y. Tax Law § 692(c) (McKinney 1987)**

**§ 692**

(c) Issuance of warrant after notice and demand.—If any person liable under this article for the payment of any tax, addition to tax, penalty or interest neglects or refuses to pay the same within ten days after notice and demand therefor is given to such person under subsection (b), the tax commission may within six years after the date of such assessment issue a warrant under its official seal directed to the sheriff of any county of the state, or to any officer or employee of the department of taxation and finance, commanding him to levy upon and sell such person's real and personal property for the payment of the amount assessed, with the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. If the tax commission finds that the collection of the tax or other amount is in jeopardy, notice and demand for immediate payment of such tax may be made by the tax commission and upon failure or refusal to pay such tax or other amount the tax commission may issue a warrant without regard to the ten-day period provided in this subsection.

**N.Y. Tax Law § 692(e) (McKinney 1988)**

(e) Judgment.—When a warrant has been filed with the county clerk the tax commission shall, in the right of the people of the state of New York, be deemed to have

obtained judgment against the taxpayer for the tax or other amounts.

**N.Y.C.R.R. § 107.6 (1992)**

**107.6 Reasonable cause.**

(a) Where: (1) a taxpayer, employer or other person subject to the provisions of article 22 of the Tax Law:

(i) fails to file a New York State income tax return on or before the last date prescribed for filing (see section 685(a)(1) of the Tax Law for the addition to tax);

(ii) fails to pay the New York State income tax shown on a New York State income tax return on or before the last date prescribed for paying (see section 685(a)(2) of the Tax Law for the addition to tax);

(iii) fails to pay the New York State income tax required to be shown on a New York State income tax return within 10 days of the date of a notice and demand therefor (see section 685(a)(3) of the Tax Law for the addition to tax);

(iv) non-willfully fails to make a New York State employer's return and pay the New York State personal income tax withheld at the time required (see section 685(f) of the Tax Law for the addition to tax);

(v) fails to file certain New York State information returns on or before the prescribed date for filing (see section 685(h) of the Tax Law for the applicable penalties);

(vi) fails to make deposits of New York State income taxes on the dates prescribed therefore (see section 685(o) of the Tax Law for the penalty); or

(vii) fails to perform certain acts with respect to the quarterly combined withholding and wage reporting return (see section 685(v) of the Tax Law and section 174.2 of this Title for the applicable penalties); then

(2) the applicable addition or additions to tax, or penalty or penalties under section 685 of the Tax Law must be imposed, unless it is shown that such failure was due to reasonable cause and not due to willful neglect. In the event that these additions to tax or penalties have been imposed and it is later determined that any such failure was due to reasonable cause and not due to willful neglect, all or part of such additions to tax or penalties will be cancelled. The absence of willful neglect alone is not sufficient grounds for not imposing additions to tax or penalties or for cancelling additions to tax or penalties.

(b) Except where reasonable cause is presumed in accordance with subdivision (c)(2) of this section, all of the facts alleged as a basis for reasonable cause must be affirmatively shown in a written statement made by the taxpayer, employer or other person against whom the additions to tax or penalties have been assessed or are assessable. Where such taxpayer, employer or other person is unable to provide such statement or does not have a personal knowledge of such facts, a showing of reasonable cause may be made on behalf of the taxpayer, employer or other person by an individual with a personal knowledge of such facts. In determining whether reasonable cause exists, in addition to an evaluation of such facts, the taxpayer's, employer's or other person's previous compliance record with respect to all of the taxes imposed pursuant to the Tax Law may be taken into account.

(c)(1) Reasonable cause shall not be determined to exist as a basis for not imposing or for cancelling

the additions to tax for failure to file a New York State income tax return or for failure to pay the amount of New York State income tax shown on such return, under, respectively, section 685(a)(1) and (2) of the Tax Law, where it is determined that the taxpayer or the taxpayer's duly authorized representative could have reasonably been expected to timely request extensions of time to file the New York State income tax return or extensions of time to pay the New York State income tax due, but failed to do so. However, reasonable cause may be determined to exist with respect to these additions to tax where:

(i) no extensions of time to file the New York State income tax return or no extensions of time to pay the New York State income tax due have been requested and it is determined that, given the circumstances, it would have been unreasonable to expect such extensions to be requested;

(ii) a taxpayer has complied with and exhausted all of the provisions with respect to extensions of time for filing the New York State income tax return or extensions of time for paying the New York State income tax due but was nevertheless unable to file or to pay on or before the extended due dates.

(2) A showing of reasonable cause with respect to the addition to tax, under section 685(a)(2) of the Tax Law, for the failure to pay the amount of New York State income tax shown on any New York State income tax return will be presumed, with respect to any underpayment of New York State income tax, where the taxpayer has:

(i) satisfied the requirements of section 157.2 of this Title, relating to an automatic ex-



tension of time for filing a New York State income tax return; and

(ii) the excess of the amount of New York State income tax shown on the New York State income tax return over the amount of New York State income tax paid on or before the date prescribed for the filing of the New York State income tax return (by virtue of New York State income tax withheld, payments of estimated tax and the payment in full of the estimated New York State income tax liability pursuant to section 157.2[a][4] of this Title) is no greater than 10 percent of the amount of New York State income tax shown on the New York State income tax return; and

(iii) any balance due shown on the New York State income tax return is remitted with such return. This presumption of reasonable cause will apply to only that period of time for which a taxpayer has an automatic extension of time for filing the New York State income tax return and, if any, the additional extension of time for filing such return.

(d) The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer, employer or other person:

(1) The death or serious illness of the taxpayer, employer or other person against whom the additions to tax or penalties have been assessed or are assessable, a member of such party's family, such party's personal representative or employer, or the unavoidable absence of the taxpayer, employer, other person or personal representative from the usual place of business, which precluded timely compliance, may constitute reasonable cause provided that:

(i) in the case of the failure to file any New York State income tax return, the applicable New York State income tax return is filed; or

(ii) in the case of the failure to pay or deposit any New York State income tax, such amount is paid or deposited;

within a justifiable period of time after the death, illness, or absence. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer, employer or other person as a reasonable period of time for filing the New York State income tax return and/or for paying any New York State income tax based on the facts and circumstances in each case.

*Example:* It was established that illness incapacitated the taxpayer during the period of delinquency, as well as during the period when extensions of time to file the New York State income tax return or pay the New York State income tax due could have been requested.

It was further established that no other person had access to sufficient information which would enable such person to either timely request extensions of time to file and to pay the New York State income tax due or to timely file the delinquent New York State income tax return and pay the New York State income tax due. The New York State income tax return was filed and the New York State income tax due was paid within a justifiable period of time after the taxpayer recuperated. This constitutes reasonable cause for failure to file the New York State income tax return and for failure to pay the New York State income tax due.

(2) The destruction of the place of business or business records of the taxpayer, employer or other person against whom the additions to tax or penalties have been assessed or are assessable, the place of business or business records of such party's personal representative or employer, or the taxpayer's residence or income records, including wage and tax statements and returns of information, by a fire or other documented casualty, which precluded timely compliance, may constitute reasonable cause provided that:

(i) in the case of the failure to file any New York State income tax return, the applicable New York State income tax return is filed; or

(ii) in the case of the failure to pay or deposit any New York State income tax, such amount is paid or deposited;

within a justifiable period of time after the casualty takes place. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer, employer or other person as a reasonable period of time for filing the New York State income tax return and/or for paying any New York State income tax based on the facts and circumstances in each case.

*Example:* The residence, together with the income records and the New York State personal income tax return, of a taxpayer were destroyed by a documented casualty immediately prior to the date prescribed for filing the New York State personal income tax return and paying the New York State personal income tax due. Due to the disorder created by the casualty and the proximity to the due date, the taxpayer could not have been expected to timely request extensions of time to file and to pay

the New York State personal income tax due. The income records of the taxpayer were reconstructed based on information received from the taxpayer's employer and various banks. Within a justifiable period of time after the casualty took place a New York State personal income tax return was filed and the New York State personal income tax due was paid. This constitutes reasonable cause for failure to file the New York State personal income tax return and for failure to pay the New York State personal income tax due.

(3) A pending petition to the Commissioner of Taxation and Finance for an advisory opinion or a declaratory ruling, a pending conciliation conference proceeding in the Bureau of Conciliation and Mediation Services of the Division of Taxation, a pending petition to the Division of Tax Appeals or a pending action or proceeding for judicial determination may constitute reasonable cause, until the time in which the taxpayer has exhausted its administrative or judicial remedies, as applicable, for a taxable period or periods the New York State income tax return or returns for which are due subsequent to the filing of the petition with the Commissioner of Taxation and Finance, the commencement of the conciliation conference proceeding, the filing of the petition with the Division of Tax Appeals or the commencement of the judicial action or proceeding provided that:

(i) the petition, action or proceeding involves a question or issue affecting whether or not the individual or entity is subject to New York State income tax and/or required to file a New York State income tax return;

(ii) the petition, action or proceeding is not based on a position which is frivolous nor is it



intended to delay or impede the administration of article 22 of the Tax Law; and

(iii) the facts and circumstances for such taxable period or periods are identical or virtually identical to those of the taxable period or periods covered by the petition, action or proceeding.

*Example:* An individual is awaiting a determination, after a hearing, of an administrative law judge of the Division of Tax Appeals regarding whether or not such individual was subject to New York State personal income tax and required to file a New York State personal income tax return in a prior taxable period. The individual's petition on the matter to the Division of Tax Appeals was filed prior to the due date for the New York State personal income tax return for the current taxable period. The facts and circumstances for the current taxable period are identical to those of the period covered by the petition. The individual's position is arguable and has merit based on case law. This constitutes reasonable cause for failure to file a New York State personal income tax return and for failure to pay the New York State personal income tax return and for failure to pay the New York State personal income tax due for the current taxable period.

(4) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause.

(e) An inability to timely obtain and assemble essential information (including wage and tax statements or returns of information from an employer or payor) required for the preparation of a complete New York State income tax return shall not be a basis for reasonable cause. Where an inability to timely obtain and assemble essential information required for the preparation of a complete New York State income tax return exists and extensions of time for filing such return are available under Part 157 of this Title, such extensions of time for filing must be obtained, a New York State income tax return which reflects the known New York State income tax liability must be filed on or before the extended due date for filing and any balance of New York State income tax must be paid with the New York State income tax return on that portion of the New York State income tax liability which can be ascertained and shown on such return. The relevant facts affecting that portion of the New York State income tax liability which cannot be ascertained must be fully disclosed with the timely filed New York State income tax return. When such liability is ascertained, an amended New York State income tax return must be immediately filed and any additional New York State income tax due paid with such return.

(f) The provisions of subdivisions (a), (b) and (d) of this section shall apply to the extent pertinent where any person has failed to supply correct identifying numbers as required by section 158.1(c) of this Title and such failure was due to reasonable cause and not due to willful neglect (see section 685(k) of the Tax Law for the applicable penalties). In addition to any relevant grounds for reasonable cause as exemplified in subdivision (d) of this section, further grounds for reasonable cause for failure to secure and supply such numbers, where clearly established, may include the following:

(1) a reliance in good faith on an identifying number provided to such person which subsequently proves to be erroneous; or

(2) awaiting the issuance of an identifying number or the inability to secure an identifying number despite repeated documentable attempts to do so.

(g)(1) The provisions of subdivisions (a), (b) and (d) of this section shall also apply to the extent pertinent where any taxpayer substantially understates the amount of New York State income tax for any taxable year and such understatement, or part thereof, was due to reasonable cause (see section 685(p) of the Tax Law for the addition to tax). Reasonable cause may be determined to exist only where the taxpayer has acted in good faith. Further, reasonable cause and good faith shall be considered as a basis for cancellation or waiver of all or part of the assessed or assessable addition to tax imposed under section 685(p) of the Tax Law only after the understatement of New York State income tax has been reduced in accordance with the provisions of such section by that portion of the New York State income tax attributable to any item for which there is or was substantial authority for the New York State income tax treatment thereof or for which the relevant facts affecting the New York State income tax treatment were adequately disclosed with the original tax return.

(2) In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper New York State income tax liability. In addition to any relevant grounds for reasonable cause as exemplified in subdivision (d) of this section, circumstances that indicate reasonable cause and good faith with respect to the substantial understatement of New York State income tax, where clearly established by or on behalf of the taxpayer, may include the following:

(i) an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer;

(ii) a computational or transcriptional error;

(iii) the reliance by the taxpayer on any written information, professional advice or other facts, provided such reliance was reasonable and the taxpayer had no knowledge of circumstances which should have put the taxpayer upon inquiry as to whether such facts were erroneous; or

(iv) the filing of an amended New York State income tax return which shows an additional amount of New York State income tax due or which adequately disclosed the New York State income tax treatment of an item which should have been adequately disclosed with the original New York State income tax return, provided the amended New York State income tax return is filed prior to the time the taxpayer is first contacted by the Department of Taxation and Finance concerning an audit or an examination of the New York State income tax return.

(3) No inference shall be drawn from any of the provisions of this subdivision, with respect to establishing reasonable cause under any other subdivision of this section.

(h) The provisions of this section are also applicable to the local taxes imposed under the authority of articles 30 (City of New York Personal Income Tax on Residents), 30-A (City of Yonkers Income Tax Surcharge on Residents) and 30-B (City of Yonkers Earnings Tax on Nonresidents) of the Tax Law and article 2-E (City of New York Earnings Tax on Nonresidents) of the General City Law.



## APPENDIX D

§ 58.1-1805. Memorandum of lien for collection of taxes.—A. If any taxes or fees, including penalties and interest, assessed by the Department of Taxation in pursuance of law against any person, are not paid within thirty days after the same become due, the Tax Commissioner may file a memorandum of lien in the circuit court clerk's office of the county or city in which the taxpayer's place of business is located, or in which the taxpayer resides. If the taxpayer has no place of business or residence within the Commonwealth, such memorandum may be filed in the Circuit Court of the City of Richmond. A copy of such memorandum may also be filed in the clerk's office of all counties and cities in which the taxpayer owns real estate. Such memorandum shall be recorded in the judgment docket book and shall have the effect of a judgment in favor of the Commonwealth, to be enforced as provided in Article 19 (§ 8.01-196 et seq.) of Chapter 3 of Title 8.01, except that a writ of fieri facias may issue at any time after the memorandum is filed. The lien on real estate shall become effective at the time the memorandum is filed in the jurisdiction in which the real estate is located. No memorandum of lien shall be filed unless the taxpayer is first given ten or more days' prior notice of intent to file a lien; however, in those instances where the Tax Commissioner determines that the collection of any tax, penalties or interest required to be paid pursuant to law will be jeopardized by the provision of such notice, notification may be provided to the taxpayer concurrent with the filing of the memorandum of lien. Such notice shall be given to the taxpayer at his last known address. For purposes of this section, "*last known address*" means the address shown on the most recent return filed by or on behalf of the taxpayer or the address provided in correspondence by or on behalf of the taxpayer indicating that it is a change of the taxpayer's address.

B. Recordation of a memorandum of lien hereunder shall not affect the right to a refund or exoneration under this chapter, nor shall an application for correction of an erroneous assessment affect the power of the Tax Commissioner to collect the tax, except as specifically provided in this title.

C. If after filing a memorandum of lien as required by subsection A, the Tax Commissioner determines that it is in the best interest of the Commonwealth, the Tax Commissioner may place padlocks on the doors of any business enterprise that is delinquent in either filing or paying any tax owed to the Commonwealth, or both. He shall also post notices of distraint on each of the doors so padlocked. If after three business days, the tax deficiency has not been satisfied or satisfactory arrangements for payment made, the Tax Commissioner may cause a writ of fieri facias to be issued.

It shall be a Class 1 misdemeanor for anyone to enter the padlocked premises without prior approval of the Tax Commissioner.

In the event that the taxpayer against whom the distraint has been applied subsequently makes application for correction of the assessment under § 58.1-1821, the taxpayer shall have the right to post bond equaling the amount of the tax liability in lieu of payment until the application is acted upon.

The provisions of subsection C shall be enforceable only after the promulgation, by the Tax Commissioner, of regulations under the Administrative Process Act.

§ 58.1-1806. Additional proceedings for the collection of taxes; jurisdiction and venue.—The payment of any state taxes and the filing of returns may, in addition to the remedies provided in this chapter be enforced by action at law, suit in equity or by attachment in the same manner, to the same extent and with the same rights of appeal as now exist or may hereafter be provided by law

for the enforcement of demands between individuals. The venue for any such proceeding under this section shall be as specified in subdivision 13 a of § 8.01-261. Such proceedings shall be instituted and conducted in the name of the Commonwealth of Virginia.

§ 58.1-1807. Judgment or decree; effect thereof; enforcement.—In any proceeding under § 58.1-1806 the court shall have the power to determine the proper taxes, and to enter an order requiring the taxpayer to file all returns and pay all taxes, penalties and interest with which upon a correct assessment he is chargeable for any year or years not barred by the statute of limitations at the time the proceedings were instituted. If any taxes of which collection is sought have been erroneously charged, the court may order exoneration thereof. Payment of any judgment or decree shall be enforced against the taxpayer in the same manner that it could be enforced in a proceeding between individuals. (Code 1950, §§ 58-44, 58-1017; 1984, c. 675.)

§ 58.1-1812. Assessment of omitted taxes by the Department of Taxation.—A. If the Tax Commissioner ascertains that any person has failed to make a proper return or to pay in full any proper tax he shall assess the taxes prescribed by law, adding to the taxes so assessed the penalty prescribed by law, if any, for the failure to file a return (if a return was required by law but not filed within the time prescribed by law) and the penalty or penalties prescribed by law for the failure to pay the taxes and penalty or penalties within the time prescribed by law. If no penalty is so prescribed, he shall assess a penalty of 5 percent of the tax due, or if the failure to pay in full was fraudulent, a penalty of 100 percent of the tax due. In addition thereto, interest on the outstanding tax and penalty shall be charged at the rate established under § 58.1-15 for the period between the due date and the date of full payment.

Except as otherwise provided by law, the amount of tax shall be assessed within three years after the return was filed, whether such return was filed on or after the date prescribed, and no proceeding in court without assessment shall be begun for the collection of such tax after the expiration of such period. A return of tax filed before the last day prescribed by law for the timely filing thereof shall be considered as filed on the last day. A return of recordation tax shall be considered as having been filed on the date of recordation. If no return is filed, the tax may be assessed within six years of the date such return was due. If a false or fraudulent return is filed with intent to evade the payment of tax, an assessment may be made at any time.

Upon such assessment, the Department of Taxation shall send a bill therefor to the taxpayer and the taxes, penalties and interest shall be remitted to the Department of Taxation within thirty days from the date of such bill. If such taxes, penalties and interest are not paid within such thirty days, interest at the rate provided herein shall accrue thereon from the date of such assessment until payment.

B. The Department of Taxation shall not assess penalty or interest on any assessment of tax for the recovery of an erroneous refund, as defined in this section, provided that the tax is paid to the Department within thirty days from the date of the bill. If the tax is not remitted to the Department within thirty days from the date of such bill, interest at the rate provided herein shall accrue thereon from the date of such assessment until payment.

As used in this section "erroneous refund" means any refund of tax resulting solely from an error by the Department of Taxation which results in the taxpayer receiving a refund to which the taxpayer is not entitled.



§ 58.1-1820. Definitions.—The following words, terms and phrases when used in this article shall have the meanings ascribed to them in this section.

1. "*Person assessed with any tax*," with standing to contest such assessment, shall include the person in whose name such assessment is made, a consumer of goods who, pursuant to law or contract, has paid any sales or use tax assessed against a dealer, a consumer of real estate construction who has by contract specifically agreed to pay the taxes assessed on the contractor, and any dealer who agrees to pass on to his customers the amount of any refund (net after expenses of the refund proceeding) to the extent such tax has been passed on to such customers.

2. "*Assessment*," as used in this subtitle, shall include a written assessment made pursuant to notice by the Department of Taxation and self-assessments made by a taxpayer upon the filing of a return or otherwise not pursuant to notice. Assessments made by the Department of Taxation shall be deemed to be made when a written notice of assessment is delivered to the taxpayer by an employee of the Department of Taxation, or mailed to the taxpayer at his last known address. Self-assessments shall be deemed made when the tax is paid or, in the case of taxes requiring an annual or monthly return, when the return is filed. A return filed or tax paid before the last day prescribed by law or by regulations pursuant to law for the filing or payment thereof, shall be deemed to be filed or paid on such last day.

§ 58.1-1821. Application to Tax Commissioner for correction.—Any person assessed with any tax administered by the Department of Taxation may, within ninety days from the date of such assessment, apply for relief to the Tax Commissioner. Such application shall be in the form prescribed by the Department, and shall fully set forth the grounds upon which the taxpayer relies and all facts relevant to the taxpayer's contention. The Tax Com-

missioner may also require such additional information, testimony or documentary evidence as he deems necessary to a fair determination of the application.

On receipt of a notice of intent to file under this section, the Tax Commissioner shall refrain from collecting the tax until the time for filing hereunder has expired, unless he determines that collection is in jeopardy.

Any person whose tax assessment has been improperly collected by the Department may apply hereunder to assert a claim that any amount so collected was exempt from process.

§ 58.1-1822. Action of Tax Commissioner on application for correction.—If the Tax Commissioner is satisfied, by evidence submitted to him or otherwise, that an applicant is erroneously or improperly assessed with any tax administered by the Department of Taxation, the Tax Commissioner may order that such assessment be corrected. If the assessment exceeds the proper amount, the Tax Commissioner shall order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid into the state treasury, and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the Tax Commissioner shall order that the applicant pay the proper taxes. He shall refund to the taxpayer any exempt funds which have been improperly collected. The Tax Commissioner shall refrain from collecting a contested assessment until he has made a final determination under this section unless he determines that collection is in jeopardy. (Code 1950, § 58-1119; 1972, c. 721; 1980, c. 633; 1984, c. 675.)

§ 58.1-1823. Reassessment and refund upon the filing of amended return.—A. Any person filing a tax return required for any tax administered by the Department of Taxation may file an amended return with the Department

(i) within three years from the last day prescribed by law for the timely filing of the return; (ii) within ninety days from the final determination of any change or correction in the liability of the taxpayer for any federal tax upon which the state tax is based, whichever is later, provided that the refund does not exceed the amount of the decrease in Virginia tax attributable to such federal change or correction; or (iii) within one year from the filing of an amended Virginia return resulting in the payment of additional tax, provided that the amended return raises issues relating solely to such prior amended return and that the refund does not exceed the amount of the payment with such prior amended return. If the Department is satisfied, by evidence submitted to it or otherwise, that the tax assessed and paid upon the original return exceeds the proper amount, the Department may reassess the taxpayer and order that any amount excessively paid be refunded to him. The Department may reduce such refund by the amount of any taxes, penalties and interest which are due for the period covered by the amended return, or any past-due taxes, penalties and interest which have been assessed within the appropriate period of limitations. Any order of the Department denying such reassessment and refund, or the failure of the Department to act thereon within three months shall, as to matters first raised by the amended return, be deemed an assessment for the purpose of enabling the taxpayer to pursue the remedies allowed under this chapter.

B. Notwithstanding the time limitation contained in subsection A, an amended individual income tax return claiming a refund for taxes paid with respect to retirement or pension benefits received from a federal retirement system created by the federal government for any officer or employee of the United States, including the United States Civil Service, the United States Armed Forces, or any agency or subdivision thereof for any taxable year beginning on or after January 1, 1985, may be filed within one year from the entry of a final judicial

order of a court of competent jurisdiction not subject to further appeal resolving the issue of the application to Virginia income tax law of the United States Supreme Court decision in the case of *Davis v. Michigan Department of the Treasury*, 57 U.S.L.W. 4389 (U.S. March 28, 1989).

C. Notwithstanding the statute of limitations established in this section, any retired employee of a political subdivision of the Commonwealth, established pursuant to Chapter 627 of the 1958 Acts of Assembly may file an amended individual income tax return until May 1, 1990, for taxable years beginning on and after January 1, 1985, and before January 1, 1986, for taxes paid on retirement income exempt pursuant to § 58.1-322.

§ 58.1-1823. Reassessment and refund upon the filing of amended return.—A. Any person filing a tax return required for any tax administered by the Department of Taxation may, within three years from the last day prescribed by law for the timely filing of the return, or within sixty days from the final determination of any change or correction in the liability of the taxpayer for any federal tax upon which the state tax is based, whichever is later, file an amended return with the Department. If the Department is satisfied, by evidence submitted to it or otherwise, that the tax assessed and paid upon the original return exceeds the proper amount, the Department may reassess the taxpayer and order that any amount excessively paid be refunded to him. The Department may reduce such refund by the amount of any taxes, penalties and interest which are due for the period covered by the amended return, or any past-due taxes, penalties and interest which have been assessed within the appropriate period of limitations. Any order of the Department denying such reassessment and refund, or the failure of the Department to act thereon within three months shall, as to matters first raised by the amended return, be deemed



an assessment for the purpose of enabling the taxpayer to pursue the remedies allowed under this chapter.

B. Notwithstanding the time limitation contained in subsection A, an amended individual income tax return claiming a refund for taxes paid with respect to retirement or pension benefits received from a federal retirement system created by the federal government for any officer or employee of the United States, including the United States Civil Service, the United States Armed Forces, or any agency or subdivision thereof for any taxable year beginning on or after January 1, 1985, may be filed within one year from the entry of a final judicial order of a court of competent jurisdiction not subject to further appeal resolving the issue of the application to Virginia income tax law of the United States Supreme Court decision in the case of *Davis v. Michigan Department of the Treasury*, 57 U.S.L.W. 4389 (U.S. March 28, 1989).

C. Notwithstanding the statute of limitations established in this section, any retired employee of a political subdivision of the Commonwealth, established pursuant to Chapter 627 of the 1958 Acts of Assembly may file an amended individual income tax return until May 1, 1990, for taxable years beginning on and after January 1, 1985, and before January 1, 1986, for taxes paid on retirement income exempt pursuant to § 58.1-322 of the Code of Virginia.

§ 58.1-1824. Protective claim for a refund.—Any person who has paid an assessment of taxes administered by the Department of Taxation may preserve his judicial remedies by filing a claim for refund with the Tax Commissioner on forms prescribed by the Department within three years of the date such tax was assessed. Such taxpayer may, at any time before the end of one year after the date of the Tax Commissioner's decision on such claim, seek redress from the circuit court under § 58.1-1825. The Tax Commissioner may decide such claim on the merits in the manner provided in § 58.1-1822 for appeals

under § 58.1-1821, or may, in his discretion, hold such claim without decision pending the conclusion of litigation affecting such claim. The fact that such claim is pending shall not be a bar to any other action under this chapter.

§ 58.1-1825. (Effective until July 1, 1992) Application to court for correction of erroneous or improper assessments of state taxes generally.—Any person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment may, unless otherwise specifically provided by law, within three years from the date such assessment is made, apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261. The application shall be before the court when it is filed in the clerk's office. Such application shall not be deemed filed unless the assessment has been paid.

Any person whose assessment has been improperly collected from property exempt from process may within three years from the date such assessment is made, or if later, within one year of the Tax Commissioner's decision on a process exemption claim under § 58.1-1821 apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261.

The Department shall be named as defendant and the proceedings shall be conducted as an action at law before the court sitting without a jury. It shall be the burden of the applicant in any such proceeding to show that the assessment or collection complained of is erroneous or otherwise improper. The court's order shall be entered pursuant to § 58.1-1826.

§ 58.1-1825. (Effective July 1, 1992) Application to court for correction of erroneous or improper assessments of state taxes generally.—Any person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment may, unless otherwise

specifically provided by law, within three years from the date such assessment is made, apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261. The application shall be before the court when it is filed in the clerk's office. Such application shall not be deemed filed unless (i) the assessment has been paid or (ii) in lieu of payment, the taxpayer has posted bond pursuant to the provisions of § 16.1-107, with corporate surety licensed to do business in Virginia, within 90 days from the date such assessment is made.

Any person whose assessment has been improperly collected from property exempt from process may within three years from the date such assessment is made, or if later, within one year of the Tax Commissioner's decision on a process exemption claim under § 58.1-1821 apply to a circuit court for relief. The venue for such proceedings shall be as specified in subdivision 13 b of § 8.01-261.

The Department shall be named as defendant and the proceedings shall be conducted as an action at law before the court sitting without a jury. It shall be the burden of the applicant in any such proceeding to show that the assessment or collection complained of is erroneous or otherwise improper. The court's order shall be entered pursuant to § 58.1-1826.

§ 58.1-1826. Action of court.—If the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order that the assessment be corrected. If the assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the court shall order that the applicant pay the proper taxes and to this end the court shall be clothed with all the powers and duties of the authority

which made the assessment complained of as of the time when such assessment was made and all the powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard. The court may order that any amount which has been improperly collected be refunded to such applicant. A copy of any order made under this section or § 58.1-1827 correcting an erroneous or improper assessment shall be certified by the clerk of the court to the Tax Commissioner.

§ 58.1-1827. Correction of double assessments.—Irrespective of the foregoing provisions, when it is shown to the satisfaction of the court that there has been a double assessment in any case, one of which assessments is proper and the other erroneous, and that a proper single tax has been paid thereon, the court may order that such erroneous assessment be corrected, whether the erroneous tax has been paid or not and even though the application was not made within the period of limitation, as hereinbefore required.

§ 58.1-1829. Costs in proceedings under §§ 58.1-1825 through 58.1-1828.—If the final order of the court in any proceeding under §§ 58.1-1825 through 58.1-1828 grants the relief prayed for, no costs shall be taxed against the applicant; but in no event shall any costs be taxed against the Commonwealth in any proceeding under such sections.

§ 58.1-1830. Effect of order.—An order of exoneration under §§ 58.1-1826, 58.1-1827 or § 58.1-1828, when delivered to the Tax Commissioner, shall restrain him from collecting so much as is thus erroneously charged. If what was so erroneously charged has been paid, the order of the court under §§ 58.1-1826, 58.1-1827 or § 58.1-1828, when presented to the appropriate state or local official, shall serve as the only direction necessary to obtain refund of the amount so ordered.



§ 58.1-1831. No injunctions against assessment or collection of taxes.—No suit for the purpose of restraining the assessment or collection of any tax, state or local, shall be maintained in any court of this Commonwealth, except when the party has no adequate remedy at law.

## APPENDIX E

## Wis. Stat.

71.82 Interest. (1) NORMAL. (a) In assessing taxes interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

(b) Except as otherwise specifically provided, in crediting overpayments of income and surtaxes against underpayments or against taxes to be subsequently collected and in certifying refunds of such taxes interest shall be added at the rate of 9% per year from the date on which such taxes when assessed would have become delinquent if unpaid to the date on which such overpayment was certified for refund except that if any overpayment of tax is certified for refund within 90 days after the last date prescribed for filing the return of such tax or 90 days after the date of actual filing of the return of such tax, whichever occurs later, no interest shall be allowed on such overpayment. For purposes of this section the return of such tax shall not be deemed actually filed by an employee unless and until the employee has included the written statement required to be filed under § 71.65 (1). However, when any part of a tax paid on an estimate of income, whether paid in connection with a tentative return or not, is refunded or credited to a taxpayer, such refund or credit shall not draw interest.

(c) Any assessment made as a result of the adjustment or disallowance of a claim for credit under § 71.07, 71.78 or 71.47 or subch. VIII or IX, except as provided in sub. (2)(c), shall bear interest at 12% per year from the due date of the claim.

(2) DELINQUENT. (a) *Income and franchise taxes.* Income and franchise taxes shall become delinquent if not paid when due under §§ 71.03 (8), 71.24 (9) and 71.44

(4), and when delinquent shall be subject to interest at the rate of 1.5% per month until paid.

(b) *Department may reduce delinquent interest.* The department shall provide by rule for reduction of interest under par. (a) to 12% per year in stated instances wherein the secretary of revenue determines that reduction is fair and equitable.

(c) *Adjustment to credits.* Any assessment made as a result of the disallowance of a claim for credit made under § 71.07, 71.28 or 71.47 or subch. VIII or IX with fraudulent intent, or of a portion of a claim made under said subchapters or sections that was excessive and was negligently prepared, shall bear interest from the due date of the claim, until refunded or paid, at the rate of 1.5% per month.

(d) *Withholding tax.* Of the amounts required to be withheld any amount not deposited or paid over to the department within the time required shall be deemed delinquent and deposit reports or withholding reports filed after the due date shall be deemed late. Delinquent deposits or payments shall bear interest at the rate of 1.5% per month from the date deposits or payments are required under this section until deposited or paid over to the department. The department shall provide by rule for reduction of interest on delinquent deposits to 12% per year in stated instances wherein the secretary of revenue determines reduction fair and equitable. In the case of a timely filed deposit or withholding report, withheld taxes shall become delinquent if not deposited or paid over on or before the due date of the report. In the case of no report filed or a report filed late, withheld taxes shall become delinquent if not deposited or paid over by the due date of the report. In the case of an assessment under § 71.83(1)(b)(2), the amount assessed shall become delinquent if not paid on or before the first day of the calendar month following the calendar month in which the assessment becomes final, but if the assess-

ment is contested before the tax appeals commission or in the courts, it shall become delinquent on the 30th day following the date on which the order or judgment representing final determination becomes final.

71.83 Penalties. (1) CIVIL. (a) *Negligence.* 1. Failure to file. In case of failure to file any return required under § 71.03, 71.24 or 71.44 on the due date prescribed therefor, including any extension of time for filing, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as tax on the return 5% of the amount of the tax if the failure is for not more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, not exceeding 25% in the aggregate. For purposes of this subdivision, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the due date prescribed for payment and by the amount of any credit against the tax which may be claimed upon the return.

2. Incomplete or incorrect return. If any person required under this chapter to file an income or franchise tax return files an incomplete or incorrect return, unless it is shown that such filing was due to good cause and not due to neglect, there shall be added to such person's tax for the taxable year 25% of the amount otherwise payable on any income subsequently discovered or reported. The amount so added shall be assessed, levied and collected in the same manner as additional normal income or franchise taxes, and shall be in addition to any other penalties imposed by this chapter. In this subdivision, "return" includes a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under § 71.03 (2) (g) to (L) after the filing of that separate return, and a joint return filed by the spouses



with respect to a taxable year for which a separate return is filed under § 71.03 (2) (m) after the filing of that joint return.

3. Incomplete or incorrect deposit or withholding report. If any person required under subch. X to file a deposit report or withholding report files an incomplete or incorrect report, or fails to properly withhold or fails to properly deposit or pay over withheld funds, unless it can be shown that the filing or failure was due to good cause and not due to neglect, there shall be added to the tax 25% of the amount not reported or not withheld, deposited or paid over. The amount so added shall be assessed, levied and collected in the same manner as additional income or franchise taxes, and shall be in addition to any other penalties imposed in this subchapter. "Person," in this subdivision, includes an officer or employee of a corporation or other responsible person or a member or employee of a partnership or other responsible person who, as such officer, employee, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

4. Late filing of withholding report. In case of failure to file any withholding deposit or payment report required under § 71.65 (3) on the date prescribed therefor, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as withheld taxes on the report 5% of the amount if the failure is not for more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, not exceeding 25% in the aggregate.

5. Failure to notify. Any employee who fails to notify the department as required by § 71.64(2)(b)2 shall be subject to a penalty of \$10.

6. Retirement plans. Any natural person who is liable for a penalty for federal income tax purposes under sec-

tion 72(m) (5), (q), (t) and (v), 4973, 4974, 4975 or 4980A of the internal revenue code is liable for 33% of the federal penalty unless the income received is exempt from taxation under § 71.05 (1) (a). The penalties provided under this subdivision shall be assessed, levied and collected in the same manner as income or franchise taxes.

7. Failure to keep records required by the department. Any taxes assessed upon information not contained in records required by the department under § 71.80 (9) to be kept by any person subject to an income or franchise tax shall carry a penalty of 25% of the amount of the tax. The penalty shall be in addition to all other penalties provided in this chapter.

8. Joint return replacing separate returns. If the amount shown as the tax by the husband and wife on a joint return filed under § 71.03 (2) (g) to (L) exceeds the sum of the amounts shown as the tax upon the separate return of each spouse and if any part of that excess is attributable to negligence or intentional disregard of this chapter, but without intent to defraud, at the time of the filing of that separate return, then 25% of the total amount of that excess shall be added to the tax.

(b) *Intent to defeat or evade.* 1. Income and franchise; all persons. With respect to calendar year 1985 or corresponding fiscal year and subsequent calendar or fiscal years, any person making an incorrect, or failing to make a, report, including a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under § 71.03 (2) (g) to (L) after the filing of that separate return, and including a joint return filed by the spouses with respect to a taxable year for which a separate return is filed under § 71.03(2)(m) after the filing of that joint return, with intent, in either case, to defeat or evade the income or franchise tax assessment required by law, shall have added to the tax an amount equal to 100% of the tax on the entire under-

payment. No amount paid under this subdivision may be deducted from gross income and assessments hereunder may be made with respect to decedents. Amounts added to the tax under this subdivision shall be treated as additional taxes for all purposes of assessment and collection. Repeated late filing of an income or franchise tax return evinces an intent to defeat or evade the income or franchise tax assessment required by law.

2. Withholding. The penalties provided by this subdivision shall be paid upon notice and demand of the secretary of revenue or the secretary's delegates and shall be assessed and collected in the same manner as income or franchise taxes. Any person required to withhold, account for or pay over any tax imposed by this chapter, whether exempt under §§ 71.05 (1) to (3), 71.26 (1) or 71.45 or not, who intentionally fails to withhold such tax, or account for or pay over such tax, shall be liable to a penalty equal to the total amount of the tax, plus interest and penalties on that tax, that is not withheld, collected, accounted for or paid over. "Person," in this subdivision, includes an officer or employee of a corporation or other responsible person or a member or employee of a partnership or other responsible person who, as such officer, employee, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

3. Employees' statements. Any person, whether exempt under § 71.05 (1) to (3), 71.26 (1) or 71.45 or not, required under § 71.65 (1) to furnish a written statement to an employee, who furnishes a false or fraudulent statement, or who intentionally fails to furnish a statement in the manner, at the time and showing the information required under § 71.65 (1), or rules prescribed with respect thereto, shall, for each such failure, be subject to a penalty of \$20. "Person," in this subdivision, includes an officer or employee of a corporation or other responsible person or a member or employee of a partnership or other

responsible person who, as such officer, employee, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

4. Exemption documents. Any employee who files a withholding exemption certificate, form or agreement under § 71.64(2)(b) or 71.66(1)(a), (2) or (3) with the intent to defeat or evade the proper withholding of tax under subch. X shall be subject to a penalty equal to the difference between the amount required to be withheld and the amount actually withheld for the period that the incorrect certificate, form or agreement was in effect.

5. Joint return after separate returns. If the amount shown as the tax by the husband and wife on a joint return filed under § 71.03(2)(g) to (L) exceeds the sum of the amounts shown as the tax on the separate return of each spouse and if any part of that excess is attributable to fraud with intent to evade tax at the time of the filing of that return, then 50% of the total amount of that excess shall be added to the tax.

6. Corporations. If a corporation files a false declaration of complete inactivity, or, after filing a declaration, becomes activated or reactivated and fails to file timely statements and information under this chapter covering such year or years of activity or reactivity its officers at the time of such filing or failure shall be jointly and severally liable for a civil penalty of \$25 for such filing or each such failure, which penalty may be assessed and collected as income or franchise taxes are assessed and collected.

(2) CRIMINAL. (a) *Misdemeanor*. 1. All persons. If any person, including an officer of a corporation required by law to make, render, sign or verify any return, wilfully fails or refuses to make a return at the time required in § 71.03, 71.24 or 71.44 or wilfully fails or refuses to make deposits or payments as required by § 71.65(3) or wilfully renders a false or fraudulent statement required by



§ 71.65(1) and (2) or deposit report or withholding report required by § 71.65(3), such person shall be guilty of a misdemeanor and may be fined not more than \$10,000 or imprisoned for not to exceed 9 months or both, together with the cost of prosecution.

2. Penalties for certain false documents. Any person who wilfully makes and subscribes any return, claim, statement or other document required by this chapter that that person does not believe to be true and correct as to every material matter or who wilfully aids in, procures, counsels or advises the preparation of any return, claim, statement or other document that is false or fraudulent as to any material matter related to, or required by, this chapter may be fined not more than \$10,000 or imprisoned for not more than 9 months or both, together with the cost of prosecution.

3. Divulging information. Any person who violates § 71.78 shall upon conviction be fined not less than \$100 nor more than \$500 or imprisoned for not less than one month nor more than 6 months or both.

4. Coercing employe to prepay taxes. Any employer found guilty of violating § 71.09(15)(d) may be fined not less than \$25 nor more than \$200 for each violation.

5. False withholding agreement. Any employe who wilfully supplies an employer with false or fraudulent information regarding an agreement with the intent to defeat or evade the proper withholding of tax under subch. X may be imprisoned for not more than 6 months or fined not more than \$500, plus the costs of prosecution, or both.

6. Construction contractor surety bond. Any person who fails or refuses to comply with § 71.80(16) shall be fined not less than \$300 nor more than \$5,000.

(b) *Felony*. 1. False income tax return; fraud. Any person, other than a corporation, who renders a false or fraudulent income tax return with intent to defeat or evade

any assessment required by this chapter shall be guilty of a felony and may be fined not to exceed \$10,000 or imprisoned for not to exceed 5 years or both, together with the cost of prosecution. In this subdivision, "return" includes a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under § 71.03(2)(g) to (L) after the filing of that separate return, and a joint return filed by the spouses with respect to a taxable year for which a separate return is filed under § 71.03(2)(m) after the filing of that joint return.

2. Officer or corporation; false franchise or income tax return. Any officer of a corporation required by law to make, render, sign or certify any franchise or income tax return, who makes any false or fraudulent franchise or income tax return, with intent to defeat or evade any assessment required by this chapter shall be guilty of a felony and may be fined not to exceed \$10,000 or imprisoned for not to exceed 5 years or both, together with the cost of prosecution.

3. Evasion. Any person who removes, deposits or conceals or aids in removing, depositing or concealing any property upon which a levy is authorized with intent to evade or defeat the assessment or collection of any tax administered by the department may be fined not more than \$5,000 or imprisoned for not more than 3 years or both, together with the costs of prosecution.

4. Fraudulent claim for credit. The claimant who filed a claim for credit under § 71.07, 71.28 or 71.47 or subch. VIII or IX that is false or excessive and was filed with fraudulent intent and any person who assisted in the preparation or filing of the false or excessive claim or supplied information upon which the false or excessive claim was prepared, with fraudulent intent, may be fined not to exceed \$10,000 or imprisoned for not to exceed 5 years or both, together with the cost of prosecution.

(3) LATE FILING FEES. If any person required under this chapter to file an income or franchise tax return fails

to file a return within the time prescribed by law, or as extended under § 71.03(7), 71.24(7) or 71.44(3), the department shall add to the tax of the person \$30 in the case of corporations and in the case of persons other than corporations \$2 when the total normal income tax of the person is less than \$10, \$3 when the tax is \$10 or more but less than \$20, \$5 when the tax is \$20 or more, except that \$30 shall be added to the tax if the return is 60 or more days late. If no tax is assessed against any such person the amount of this fee shall be collected as income or franchise taxes are collected, and no person shall be allowed in any action or proceeding to contest the imposition of such fee.

(4) **SALES AND USE TAX REPORTING.** This section does not apply to the failure to report, or the incomplete or incorrect reporting of, sales and use taxes due under subch. III of ch. 77 on any return filed under this chapter.

#### 71.91 Collection provisions. \* \* \*

\* \* \*

(4) **UNPAID TAX IS PERFECTED LIEN ON PROPERTY.** If any person liable to pay any income or franchise tax neglects, fails or refuses to pay the tax, the amount, including any interest, addition to tax, penalty or costs, shall be a perfected lien in favor of the department of revenue upon all property and rights to property. The lien is effective at the time taxes are due or at the time an assessment is made and shall continue until the liability for the amount to be paid or for the amount so assessed is satisfied. The perfected lien does not give the department of revenue priority over lienholders, mortgagees, purchasers for value, judgment creditors and pledges whose interests have been recorded before the department's lien is recorded.

(5) **WARRANT SHALL BE ISSUED.** (a) If any income or franchise tax is not paid when due, the department of revenue shall issue a warrant to the sheriff of any county

of the state commanding the sheriff to levy upon and sell enough of the taxpayer's real and personal property found within the county to pay the tax with the penalties, interest and costs, and to proceed upon the property in the same manner as upon an execution against property issued out of a court of record, and to return the warrant to the department and pay to it the money collected, or the part of it that is necessary to pay the tax, penalties, interest and costs within 60 days after the receipt of the warrant, and deliver the balance, if any, after deduction of lawful charges, to the taxpayer.

\* \* \*



**APPENDIX F****EXCERPTS OF RELEVANT PORTIONS OF THE  
ARIZONA CONSTITUTION, STATE STATUTES  
AND STATE REGULATIONS****I. RELEVANT PROVISIONS OF THE ARIZONA  
CONSTITUTION:****Article VI, § 14—Superior court; original jurisdiction**

Section 14. The superior court shall have original jurisdiction of:

\* \* \* \*

2. Cases of equity and at law which involve . . . the legality of any tax, impost, assessment . . .

**II. RELEVANT PROVISIONS OF THE ARIZONA  
REVISED STATUTES ANNOTATED:****Ariz. Rev. Stat. Ann. § 12-123 (1992):****Jurisdiction and powers**

A. The superior court shall have original concurrent jurisdiction as conferred by the constitution.

. . .

B. The court, and the judges thereof, shall have all powers and may issue all writs necessary to the complete exercise of its jurisdiction.

**Ariz. Rev. Stat. Ann. § 12-124 (1992):****Appellate jurisdiction; issuance of writs**

A. The superior court shall have appellate jurisdiction in all actions appealed from justices of the peace, inferior courts, boards and officers from which appeals may, by law, be taken.

**Ariz. Rev. Stat. § 12-161 (1992):****Definition of tax court**

A. In this chapter, unless the context otherwise requires, "tax court" means the tax department of the superior court in Maricopa county when exercising the original jurisdiction of the superior court over cases of equity and at law which involve the legality of any tax, impost or assessment.

**Ariz. Rev. Stat. § 12-168 (1992):****Proceedings**

A. Proceedings before the court are original, independent proceedings and shall be tried de novo.

B. If an action is an appeal from an order or determination of an administrative agency, the action shall be an original proceeding in the nature of a suit to set aside the order or determination.

**Ariz. Rev. Stat. Ann. § 12-910 (1992):****Scope of review**

A. An action to review a final administrative decision shall be heard and determined with convenient speed. The hearing shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to a finding, order, determination or decision of the administrative agency shall be heard by the court, except in the event of a trial de novo . . .

B. The trial shall be de novo if trial de novo is demanded in the complaint or answer of a defendant other than the agency . . . When a trial de novo is available under the provisions of this section, it may be had with a jury upon demand of any party.

**Ariz. Rev. Stat. Ann. § 35-196.03 (Supp. 1992):**

Refunds for invalid tax laws; appropriation required

Notwithstanding any provision of law to the contrary, no monies may be paid from the state treasury to refund monies collected under a law imposing a tax if the law is declared invalid by a final judgment of a court of competent jurisdiction until the legislature has made a specific appropriation for that purpose after the judgment has become final.

**Ariz. Rev. Stat. Ann. § 42-115 (1991):**

Time limitations for credit and refund claims

A. The period within which a claim for credit or refund may be filed, or credit or refund allowed or made if no claim is filed, is the period within which the department may make an assessment under § 42-113.

\* \* \* \*

C. The failure to begin an action for refund or credit within the time specified in this section is a bar against the recovery of taxes by the taxpayer.

**Ariz. Rev. Stat. Ann. § 42-122 (1991):**

Appeal to the department; hearing

A. Except in the case of individual income taxes, a person from whom an amount is determined to be due under this article may apply to the department by a petition in writing within forty-five days after the notice of a proposed assessment made pursuant to § 42-118, subsection B or the notice required by § 42-117, subsection B is received, or within such additional time as the department may allow, for a hearing, correction or redetermination of the action taken by the department. In the case of individual income taxes the period is ninety days from the date

the notice is mailed . . . . If only a portion of the deficiency assessment is protested, all unprotested amounts of tax, interest and penalties must be paid at the time the protest is filed. The department shall consider the petition and grant a hearing, if requested. To represent the taxpayer at the hearing or to appear on the taxpayer's behalf is deemed not to be the practice of law.

\* \* \* \*

C. All orders or decisions made on the filing of a petition for a hearing, correction or redetermination become final thirty days after notice has been received by the petitioner, unless the petitioner appeals the order or decision to the state board.

**Ariz. Rev. Stat. Ann. § 42-124 (1991):**

Appeal to state board and to court

A. A person aggrieved by a final decision or order of the department under this article may appeal to the state board . . . . The board's decision is final on the expiration of thirty days from the date when notice of its action is received by the taxpayer, unless either the department or the taxpayer brings an action in superior court as provided in subsection B.

B. The department or a taxpayer aggrieved by a decision of the board may bring an action in superior court subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. . . . Within the limits set forth in § 42-115, a taxpayer who fails to protest the payment of any tax illegally or erroneously collected may file a claim for refund of the taxes paid. Such refund claim shall



then be governed by § 42-130 and this section. The superior court shall hear and determine the appeal as a trial de novo. . . .

**Ariz. Rev. Stat. Ann. § 42-130 (1991):**

**Denial of refund**

A. If the department disallows any claim for refund, it shall notify the taxpayer accordingly. The department's action on the claim is final unless the taxpayer appeals to the department in writing within the time and in the manner prescribed by § 42-122. If the department disallows interest on any claim for refund, it shall notify the taxpayer accordingly and thereafter the claim shall be treated as a claim for refund.

B. If the department fails to mail notice of action on any claim for refund of tax or interest within six months after the claim is filed, the taxpayer, prior to mailing of notice of action on the refund claim, may consider the claim disallowed. The taxpayer may appeal to the department for a hearing pursuant to § 42-122.

**Ariz. Rev. Stat. Ann. § 42-134 (Supp. 1992):**

**Interest**

A. If it is provided by law that interest applies as determined pursuant to this section, the department shall apply the rate of interest, compounded annually, established by the director in the same manner and at the same times as prescribed by § 6621 of the United States internal revenue code. On January 1 of each year the department shall add any interest outstanding as of that date to the principal amount of the tax. For purposes of this section the amount added to the principal is thereafter considered a part of the principal amount of the tax and accrues interest pursuant to this section.

B. If the tax, whether determined by the department or the taxpayer, or any portion of the tax is not paid on or before the date prescribed for its payment the department shall collect, as a part of the tax, interest on the unpaid amount at the rate determined pursuant to this section from the date prescribed for its payment until it is paid.

**Ariz. Rev. Stat. Ann. § 42-136 (Supp. 1992):**

**Civil penalties; definition**

A. If a taxpayer fails to make and file a return for a tax administered pursuant to this article on or before the due date of the return or the due date as extended by the department, then unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, five per cent of the tax found to be remaining due shall be added to the tax for each month or fraction of a month elapsing between the due date of the return and the date on which it is filed. . . .

\* \* \* \*

D. A person who fails to pay the tax within the time prescribed shall pay a penalty of ten per cent in addition to the tax, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect. . . .

E. In the case of a deficiency, for which a determination is made of an additional amount due, which is due to negligence but without intent to defraud, the person shall pay a penalty of ten per cent of the amount of deficiency.

F. If part of a deficiency is due to fraud with intent to evade tax, fifty per cent of the total amount of the tax, in addition to the deficiency, interest, and other penalties provided in this section, shall be assessed, collected and paid as if it were a deficiency.

\* \* \* \*

H. A person who, with or without intent to evade any requirement of this article or any lawful administrative rule of the department under this article, fails to file a return or to supply information required under this article or who, with or without such intent, makes, prepares, renders, signs or verifies a false or fraudulent return or statement or supplies false or fraudulent information shall pay a penalty of not more than one thousand dollars. . . .

I. If the taxpayer files what purports to be a return of any tax administered pursuant to this article but which is frivolous or which is made with the intent to delay or impede the administration of the tax laws, that person shall pay a penalty of five hundred dollars.

**Ariz. Rev. Stat. Ann. § 42-137 (1991):**

Criminal violations; classifications; place of trial, definition

\* \* \* \*

B. It is a class 5 felony to:

1. Knowingly fail to pay any tax administered pursuant to this article due or believed due by the taxpayer with intent to evade the tax.

**Ariz. Rev. Stat. Ann. § 43-1001 (1980):**

Definitions

In this chapter, unless the context otherwise requires:

1. "Arizona adjusted gross income" of a resident individual means his Arizona gross income subject to modifications specified in §§ 43-1021 and 43-1022.

2. "Arizona gross income" of a resident individual means his federal adjusted gross income for the taxable year, computed pursuant to the Internal Revenue Code.

**Ariz. Rev. Stat. Ann. § 43-1022 (1980) (current version at § 43-1022 (Supp. 1992)):**

Subtractions from Arizona gross income

In computing Arizona adjusted gross income, the following amounts shall be subtracted from Arizona gross income:

\* \* \* \*

3. Benefits, annuities and pensions received from the state retirement system, the state retirement plan, the judges' retirement fund, the public safety personnel retirement system or a county or city retirement plan.

4. Income received as annuities under the United States civil service retirement system from the United States government service retirement and disability fund, in an amount not to exceed two thousand five hundred dollars.

**Ariz. Code Ann. § 73-1544(e) (1939) (repealed)**

(e) If the commission shall fail or neglect to act on any claim for refund or credit within one [1] year after the receipt thereof, such neglect shall have the effect of allowing such claim and the commission shall certify such refund or credit.



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No. 93-908

In The  
**Supreme Court of the United States**

October Term, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,

*Respondents.*

On Writ Of Certiorari  
To The Supreme Court Of Georgia

**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE AND BRIEF AMICUS CURIAE  
OF JAMES B. BEAM DISTILLING CO.  
IN SUPPORT OF PETITIONER**

*Counsel for Amicus Curiae:*

MORTON SIEGEL\*  
SIEGEL, MOSES, SCHOENSTADT &  
WEBSTER, P.C.  
One Illinois Center  
111 East Wacker Drive, Suite 2800  
Chicago, Illinois 60601-4798  
Telephone: 312/540-4300

JOHN L. TAYLOR, JR.  
CELESTE MCCOLLOUGH  
MATTHEW L. HESS  
JEFFERY T. COLEMAN  
VINCENT, CHOREY, TAYLOR & FEIL  
A Professional Corporation  
The Lenox Building, Suite 1700  
3399 Peachtree Road, N.E.  
Atlanta, Georgia 30326  
Telephone: 404/841-3200

\*Counsel of Record

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE OF JAMES B. BEAM DISTILLING CO.  
IN SUPPORT OF PETITIONER**

James B. Beam Distilling Co. ("Beam") hereby respectfully moves for leave to file the attached brief *amicus curiae* in the above-styled case (the "*Reich*" case) in support of the Petitioner and for reversal of the decision of the Georgia Supreme Court. Counsel for the Petitioner has consented to the filing of this brief. Beam requested the consent of Counsel for Respondents, but Counsel for the Respondents refused.

Beam's interest in the *Reich* case arises from the fact that Beam is itself currently, and for the second time in the same case, a petitioner in this Court for a Writ of Certiorari to the Supreme Court of Georgia (Case No. 93-1140) (the "*Beam*" case). A decision on Beam's petition has been deferred by the Court. Among several possibilities, the Court may be holding Beam's case in anticipation of the Court's decision in *Reich*. The Georgia Supreme Court issued its latest opinions in both *Reich* and *Beam* on the same day, based its latest decisions in the two cases in large part on the same grounds, relied in *Reich* on its holdings in *Beam*, and cross-referenced each case, one with the other. The cases are as a practical and jurisprudential matter intertwined, companion cases, and Beam will likely be directly affected by the Court's ruling in *Reich*. Both cases are ultimately about the intentional manipulation and misrepresentation of taxpayer remedies by the same Respondents so as to deprive both petitioners of their Federal constitutional rights.<sup>1</sup>

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<sup>1</sup> The Respondents in *Reich* are Marcus E. Collins, who is the Georgia State Revenue Commissioner, and the Georgia Department of Revenue. The



In short, the facts and circumstances of the case of Charles J. Reich (hereinafter "Reich" or along with other similarly situated federal retirees sometimes referred to as the "Federal Retirees") cannot be fully understood or addressed without understanding the interplay of Reich's case with the long history of manipulation and misrepresentation of the same legal remedies by the same Respondents in Beam's case. The additional facts, circumstances, and law of Beam's case – matters which, though directly relevant, will not be fully addressed in the briefs of the Reich parties – will serve to inform the Court about the full set of circumstances leading up to the Georgia court's decision in *Reich*.

Simply put, after remand from this Court in 1991, Respondents sought to eliminate the remedy that they had previously told the Federal Retirees and Beam to use. The Respondents were successful, and the Georgia Supreme Court retroactively eliminated the remedy that the same court had previously held to be the appropriate remedy. Thus, Reich and Beam followed years of direction from the Respondents and the Georgia courts and used the statutory refund remedy everyone had recognized only to have the Respondents and the Georgia Supreme Court later say, after it was too late to follow any other course, that the statutory refund remedy did

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Respondents in *Beam* are the State of Georgia; Joe Frank Harris, individually (former Georgia Governor); Zell Miller, individually and as Governor of the State of Georgia; Marcus E. Collins, individually and as Georgia State Revenue Commissioner; and Claude L. Vickers, individually and as Director of the Fiscal Division of the Department of Administrative Services. All these respondents are represented by attorneys in the Georgia Department of Law in both cases.

not apply to their claims after all.<sup>2</sup> To allow such a course of action to continue or to stand would be to undermine the confidence of law-abiding, taxpaying citizens that the United States Constitution stands as a barrier to the unjust, permanent taking of their property by the states.

The attached brief will highlight additional facts and circumstances showing the length to which the Respondents will go to protect the State fisc, even to the point of directly contravening the clear, unanimous Federal constitutional law as articulated by this Court. Respondents argued and the lower court in *Beam* held that, even if the Refund Statute applied to Beam's situation, Beam would not have standing to receive a refund of the taxes collected in violation of the Commerce Clause because Beam had indicated on invoices to its customers the amount of the tax everyone admits Beam paid.<sup>3</sup> Though this

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<sup>2</sup> The Respondents argued and the Georgia Supreme Court has now held 1) that Georgia's tax refund statute for redress of illegally collected taxes (O.C.G.A. § 48-2-35, the "Refund Statute," Beam's Petition for Writ of Certiorari in Case No. 93-1140 (filed Jan. 13, 1994) at Appendix MM ("Beam's Cert. Pet. App.")) does not apply to taxes collected in contravention of the Constitution of the United States; and 2) that the elimination of the postdeprivation, statutory remedy found in the Refund Statute and relied on by Reich and Beam was not a violation of Reich's and Beam's Federal due process rights because Reich and Beam had available to them adequate predeprivation remedies. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) ("*Reich* (Ga. I)") (Beam's Cert. Pet. App. L), vacated and remanded, 509 U.S. –, 113 S. Ct. 3028 (1993) (Beam's Cert. Pet. App. D), on remand, 263 Ga. 602, 437 S.E.2d 320 (Dec. 2, 1993) ("*Reich* (Ga. II)") (Beam's Cert. Pet. App. K), cert. granted, 114 S. Ct. 1048 (Feb. 22, 1994); *James B. Beam Distilling Co. v. State*, 263 Ga. 609, 437 S.E.2d 782 (Dec. 2, 1993) ("*Beam* (Ga. II)") (Beam's Cert. Pet. App. A), cert. petition pending, U.S. S. Ct. Case No. 93-1140.

<sup>3</sup> As a condition to selling alcoholic beverages to its customers in Georgia, Beam, during the time period relevant to its case, was compelled under the then current versions of the alcohol tax statute at issue (O.C.G.A. § 3-4-60, the "Pre-1985 Alcohol Tax Statute," Beam's Cert. Pet. App. EE) to prepay the applicable Georgia alcohol taxes by purchasing stamps in proper

Commerce Clause/"pass-on" issue was not at issue in *Reich*, the Georgia court's use of this issue sheds light upon, among other things, what relief should be granted in the *Reich* case. Apart from being factually, legally, and economically flawed, the lower court holding with respect to "pass-on" and standing (sometimes referred to herein as the "pass-on/standing" defense, bar, argument, or issue) provide another example of the extent to which the Respondents and the Georgia courts are willing to ignore Federal law in order to retain a taxpayer's unconstitutionally collected property. The lower court's repeated refusal to follow Federal constitutional law on

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denominations denoting the prior payment of taxes and affixing these stamps to each and every bottle or container of alcoholic beverages prior to its shipment across Georgia's state lines. See *infra* Brief note 26. Several years ago it was decided in the *Beam* case that the Pre-1985 Alcohol Tax Statute unconstitutionally imposed a tax upon imported alcoholic beverages at twice the rate imposed upon the same beverages produced in Georgia from Georgia-grown products. Having paid the higher taxes, as Respondents admit *Beam* did, see *infra* Brief note 37, *Beam* (like all local and out-of-state alcohol producers) invoiced the amount of the tax to *Beam*'s wholesalers, thereby increasing the shelf price of *Beam*'s products. The effect was that the shelf price of *Beam*'s products was higher because of the tax than the shelf price of *Beam*'s local Georgia competitors. Thus, in the words of this Court in a practically identical case involving a discriminatory alcohol tax violative of the Commerce Clause, the

*tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent petitioner passed on the economic incidence of the tax to others), but also because it placed petitioner at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products.*

*McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida*, 496 U.S. 18, 110 S. Ct. 2238, 2256 (1990) (emphasis supplied) ("*McKesson*"). Hence, "[E]ven if the tax [was] completely and successfully passed on, it increase[d] the price of [*Beam*'s] products as compared to the exempted beverages." *Id.*, 110 S. Ct. at 2256 (quoting *Bacchus Imports v. Dias*, 468 U.S. 263, 267, 104 S. Ct. 3049, 3053 (1984)).

these points strongly supports the grant of specific relief to *Reich*.

Moreover, because of this superficial distinction between *Beam* and *Reich* on the basis of the pass-on/standing issue, a simple vacation and remand of the lower court's decision in *Beam* would afford Respondents an additional opportunity for more of the same kind of manipulation at the remedial level unless this Court addresses the problem. The attached brief will, therefore, respectfully suggest how the Court might finally resolve these controversies between taxpayers and the Respondents and conserve judicial resources while protecting the property and due process rights of taxpayers, the supremacy of the Federal Constitution, this Court's decisions, and the rule of law. Namely, this Court should render judgments for the taxpayers in *Reich* and *Beam* in the amount of the unconstitutionally collected taxes, plus interest.

Respectfully submitted,

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Counsel of Record

MORTON SIEGEL

SIEGEL, MOSES, SCHOENSTADT &  
WEBSTER, P.C.

One Illinois Center

111 East Wacker Drive, Suite 2800

Chicago, Illinois 60601-4798

Telephone: 312/658-2000

JOHN L. TAYLOR, JR.

VINCENT, CHOREY, TAYLOR & FEIL

A Professional Corporation

The Lenox Building, Suite 1700

Atlanta, Georgia 30326

Telephone: 404/841-3200



No. 93-908

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In The  
**Supreme Court of the United States**  
October Term, 1993

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CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

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On Writ Of Certiorari  
To The Supreme Court Of Georgia

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**BRIEF AMICUS CURIAE OF JAMES B. BEAM  
DISTILLING CO. IN SUPPORT OF PETITIONER**

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## INTEREST OF THE AMICUS CURIAE

Beam has stated its interest in the *Reich* case in the foregoing motion, and respectfully refers the Court to that discussion. In short, the within *amicus* has suffered and is under threat of suffering the same due process deprivation with respect to Georgia taxes.

## SUMMARY OF ARGUMENT

If this Court does not specifically order a refund in *Reich* and *Beam*, Respondents will, in the *Beam* case, have an additional opportunity to continue their manipulation of remedies against Georgia taxpayers with Federal constitutional claims after any remand from this Court. Respondents' pass-on/standing argument asserted against Beam is completely untenable under *McKesson*. This Court should reverse the lower court opinions in *Reich* and *Beam* and grant these taxpayers a refund of the unconstitutionally collected taxes.

After having lost on the merits of Reich's and Beam's constitutional claims, Respondents eliminated the remedy that Respondents had previously and affirmatively represented as the correct remedy for Reich and Beam. Reich and Beam followed the advice and direction of the Respondents and the Georgia courts and used the Refund Statute only to have Respondents and the Georgia Supreme Court later to say that it was too late to follow any other course and that the Refund Statute did not apply to Reich and Beam after all. All legislative, judicial, and official statements and conduct on the part of Respondents and the Georgia courts had previously directed taxpayers to use the Refund Statute. Federal due process prohibits such *post hoc* manipulation of remedies



and estops Respondents from arguing that Reich and Beam should have pursued some other course. At this point, the only option consistent with Federal due process is for Respondents to refund to Reich and Beam the unconstitutionally collected taxes. None of the administrative, equitable, or declaratory remedies cited by the Georgia court pass constitutional muster as clear and certain, duress-free predeprivation remedies that Reich or Beam could have pursued.

### ARGUMENT

#### I. THE ABSENCE OF A SPECIFIC ORDER OF A REFUND WILL AFFORD RESPONDENTS AN ADDITIONAL OPPORTUNITY FOR MANIPULATION OF REMEDIES ON ANY FUTURE REMAND FROM THIS COURT.

Having first held in its decision in *Reich* (Ga. I), 422 S.E.2d at 846, that the Refund Statute never applied to the situation of unconstitutionally collected taxes after all, the Georgia Supreme Court then held in *Beam* (Ga. II), 437 S.E.2d at 782, that Respondents had established a pass-on/standing defense to Beam's claim under that same (putatively resurrected) Refund Statute.<sup>1</sup> In doing so, the

<sup>1</sup> In *Beam* (Ga. II), the Georgia Supreme Court, despite its holdings to the contrary in *Reich* (Ga. I and II) and without explanation, "assum[ed] that [the Refund Statute] may be an appropriate means by which one may seek a refund of taxes paid pursuant to a statute subsequently declared unconstitutional." 437 S.E.2d at 784 n.3 (emphasis supplied). The following cite was offered as the sole support for this equivocation: "See *State of Georgia v. Private Truck Council* [ ], 258 Ga. 531 (371 SE2d 378) (1988) [confirming the availability of the Refund Statute for constitutional claims]. But see *Reich v. Collins*, 262 Ga. 625 (422 SE2d 826) (1992) [retracting the availability of the Refund Statute for constitutional claims]." *Id.*

Georgia court conspicuously ignored this Court's unanimous rejection of the very same pass-on/standing defense to a claim of unconstitutional tax discrimination as a matter of Federal law. See *McKesson*, 110 S. Ct. 2255-56.<sup>2</sup>

In other words, the very event held by this Court (the so-called "pass-on") to inflict the unconstitutional Commerce Clause injury upon a taxpayer in Beam's position (by disadvantaging the taxpayer's products vis-à-vis local, preferred competitors, see *McKesson*, 110 S. Ct. at

<sup>2</sup> Respondents' attempt to portray the pass-on/standing issue as an adequate and independent state law basis on which to deny Beam relief is completely illegitimate, for the Georgia court's denial of a refund based on pass-on/standing is neither "independent" of controlling Federal Commerce Clause and due process jurisprudence nor "adequate" since this Court has already rejected the pass-on/standing defense in this identical context of Commerce Clause discrimination. See *id.*; see also *Harper v. Virginia Dep't of Taxation*, 590 U.S. \_\_\_, 113 S. Ct. 2510, 2519 (1993) (no "independent and adequate ground that [state's] law of remedies offered no 'retrospective refund remedy'"); *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 106 S. Ct. 1904, 1911 (1986) (Federal law question integral to state court's disposition); *Straub v. Baxley*, 355 U.S. 313, 78 S. Ct. 277, 281 (1958) (non-federal ground of lack of standing not adequate because such ground was contrary to Federal law); *West Chicago Street R.R. Co. v. Illinois*, 201 U.S. 506, 26 S. Ct. 518, 521 (1906) (Federal questions permeated whole case).

The Refund Statute provides that a "taxpayer shall be refunded" O.C.G.A. § 48-2-33(a) (emphasis supplied). The term "Taxpayer" means any person made liable by law to file a return or to pay taxes." O.C.G.A. §§ 48-1-25 (Beam's Cert. Pet. App. LL); 3-1-2(21) (App. R). Under Georgia law, "[o]nly the party who actually paid the taxes," *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 198 S.E.2d 900, 902 (1973), is accorded standing to assert a refund. In relying upon cases involving sales taxes in Georgia for the denial of standing to Beam, see, e.g., *Eimco BSP Serv. Co. v. Chilivis*, 241 Ga. 263, 244 S.E.2d 829 (1978); *Atlanta Am. Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966); *Blackmon v. Georgia Independent Oilmen's Ass'n*, 129 Ga. App. 171, 198 S.E.2d 896 (1973); and *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 198 S.E.2d 900 (1973), the Georgia court ignored the controlling authority of this Court that it is the discrimination between local and out-of-state products that occasions the Commerce Clause violation. See *McKesson*, 110 S. Ct. at 2256.

2256) was used by the Georgia court to deny Beam a refund. As this Court has explained clearly and at length in *McKesson*, the fact that the higher tax is included in the cost of the disadvantaged taxpayer's product is the proof that the disfavored taxpayer suffers competitive injury under the Commerce Clause when compared to preferred local taxpayers.<sup>3</sup> The Georgia court's contrary reasoning constitutes a clear refusal to follow this Court's holding in *McKesson*, and Beam should not be denied standing on that basis.

Respondents' abandonment of the Refund Statute in *Reich* and concurrent use of it against Beam should not rescue Respondents from their obligation to refund unconstitutionally collected taxes. The Georgia Supreme Court has now held in *Reich* that the Refund Statute cannot apply to Reich's or Beam's case. Regardless of whatever defenses may have been available under the Refund Statute, Federal due process (not the Georgia Refund Statute) at a minimum entitles Reich and Beam to meaningful, backward-looking relief to rectify retroactively the unconstitutional deprivation, *i.e.* a refund.<sup>4</sup> The conclusion is as inescapable as it is fair and correct: To satisfy Federal due process, Georgia must retroactively

<sup>3</sup> See *id.* at 2255-57. "To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share." *Id.* at 2256.

<sup>4</sup> See *id.* at 2247 & 2258. Indeed, Beam's claim is predicated directly upon the Due Process, Equal Protection, and Supremacy Clauses of the United States Constitution, and, under those provisions and at a minimum, Beam is entitled to meaningful backward-looking relief. See *id.*; Beam's Second Amendment to Complaint, R. (Beam (Ga. II), No. S93A1217) at 1157-58, ¶¶ 71-73 (Beam's Cert. Pet. App. O); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971).

achieve nondiscrimination among its taxpayers; with no other options left, Respondents must refund the unconstitutionally collected taxes.<sup>5</sup>

Despite *McKesson*'s firm rejection of the pass-on/standing defense to justify Commerce Clause discrimination, Respondents (throughout their brief in opposition to Beam's Petition for Writ of Certiorari ("Respondents' Beam Cert. Op. Brief")) have suggested repeatedly that their assertion of a purported pass-on/standing defense distinguishes Beam's case from Reich's case. As shown above, it does not. But, if this Court were to reverse the Georgia court's decision in *Reich* (Ga. II) by granting Reich relief, and then to vacate or reverse and remand *Beam* in light of *Reich* without also stating exactly the form of relief to which Reich and Beam are entitled, Respondents and the Georgia courts will no doubt use the groundless pass-on/standing argument to deny Beam relief in yet some future round of this long, unfair ordeal.<sup>6</sup> The history of these cases further makes it clear

<sup>5</sup> As for equitable considerations argued by Respondents, once a constitutional violation is established, due process, not equity, determines the scope of the relief. See *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 2334 (1990). And, no matter what factors a court may consider at the remedial level, the minimum Federal due process standards articulated in *McKesson* must be met when all is done. See *McKesson*, 110 S. Ct. at 2258 ("The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.") (emphasis supplied). Reich and Beam want no more (but no less) than the Federal minimum relief described in *McKesson*.

<sup>6</sup> Beam began litigation against Respondents nearly a decade ago in 1985. This Court reversed and remanded *Beam* for implementation of an appropriate remedy in 1991. On remand, the Georgia Supreme Court remanded the case to the trial court and then, later on a second appeal from the trial court, denied Beam any relief along with Reich on December 2, 1993. Beam has returned to this Court for the second time now, and this Court will likely announce its decision in *Reich* in 1995 since Respondents



that even the appearance of any discretion with respect to remedy on remand will be used by the Respondents and the Georgia courts to deny Reich's and Beam's Federal constitutional rights. *See infra* note 20.

Beam respectfully submits that this Court should reverse the lower court opinions in *Reich* and *Beam* and grant these taxpayers a refund of the unconstitutionally collected taxes. If the Court grants such relief in *Reich*, the Court should grant certiorari in *Beam*, reverse the lower court, and then (rather than merely remanding in light of *Reich*) summarily grant judgment to Beam in the amount of the unconstitutionally collected taxes in a per curiam opinion.<sup>7</sup> If the Court grants relief in *Reich*, nothing remaining in *Beam* will distinguish *Beam* from this Court's unanimous *McKesson* decision. The Court need not take briefing and hear argument on what it has already unanimously decided in *McKesson*.<sup>8</sup> In fact, a refund was

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refused the Court's invitation for expedited treatment of *Reich*. Thus, lest Beam endure yet another three or four year futile trip through the Georgia courts and back to this Court, it is imperative that, in its disposition of *Reich* and *Beam*, this Court make its judgment and mandate to Respondents clear: The taxpayers in *Reich* and *Beam* shall be refunded the unconstitutionally collected taxes because this is the only available remedy that comports with minimum standards of Federal due process articulated by this Court.

<sup>7</sup> *See Von Cleef v. New Jersey*, 395 U.S. 814, 89 S. Ct. 2051 (1969); *Keney v. New York*, 388 U.S. 440, 87 S. Ct. 2091 (1967); *Allison v. United States*, 386 U.S. 13, 87 S. Ct. 874 (1967) (case remanded with instructions); *see also General Atomic Co. v. Felter*, 436 U.S. 493, 98 S. Ct. 1939, 1941 (1978) ("[A] litigant who . . . has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court."); *Connor v. Coleman*, 425 U.S. 675, 96 S. Ct. 1814, 1814 (1976) ("Ten years of litigation have not yet resulted in a constitutionally apportioned Mississippi Legislature.").

<sup>8</sup> Although *McKesson* sets forth a range of remedial choices for states in the position Respondents were in three years ago, *see* 110 S. Ct. at 2252,

ordered by this Court in the *Ward* case.<sup>9</sup> If the Court orders a refund, *Ward*, *Reich*, and *Beam*, therefore, will represent an application of *McKesson* principles in the unique situation where a state has refused to follow the minimum standards of Federal due process.

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the Georgia Respondents and courts have already had ample opportunity to choose from among *McKesson*'s options, but have refused to do so, have forfeited their chance to make a selection, and have forced this Court to make a choice for them. This Court is not in a position to assess and collect taxes from the favored taxpayers, itself a constitutionally problematical matter at best. *See McKesson*, 110 S. Ct. at 2252 & n.23. The situation faced by the Court is similar to that faced by a court in reviewing the decision of another decisionmaker vested with controlled discretion. When the other decisionmaker has refused to choose among the options legally available to it or has chosen incorrectly, the court of review may make the choice for the decisionmaker. *See, e.g., Varney v. Secretary of Health and Human Services*, 859 F.2d 1396, 1401 (11th Cir. 1988); *Winans v. Bowen*, 853 F.2d 643, 647 (1987) (reversing and remanding for award of benefits); *Johnson v. Bowen*, 817 F.2d 983, 986 (2d Cir. 1987) ("[W]here application of the correct legal principles to the record could lead to only one conclusion, there is no need to require agency reconsideration."); *Benten v. Kessler*, 799 F. Supp. 281, 291 (E.D.N.Y. 1992); *Welchance v. Bowen*, 731 F. Supp. 806, 810 (M.D. Tenn. 1989).

<sup>9</sup> *Ward v. Board of County Comm'rs*, 253 U.S. 17, 40 S. Ct. 419 (1920), is closely analogous to *Reich* and *Beam*. This Court in *Ward* held that the collection of illegal taxes by a state imposes on the state an obligation to pay the money back as a matter of Federal due process:

It is a well-settled rule that "money got through imposition may be recovered back"; and, as this court has said on several occasions, "the obligation to due justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." . . . To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.

*Id.* at 422 (citations omitted).

**II. IN RESPONSE TO THIS COURT'S DECISIONS IN FAVOR OF TAXPAYERS, RESPONDENTS HAVE ELIMINATED THE SINGLE REMEDY THAT RESPONDENTS PREVIOUSLY AND AFFIRMATIVELY REPRESENTED AS THE CORRECT REMEDY.**

When laid out in unadulterated fashion, the facts of the *Reich* and *Beam* cases speak for themselves and demonstrate why the latest decisions of the Georgia Supreme Court should not be allowed to stand. The facts of the *Reich* case have been well-stated by Reich in his Brief in the above-styled case. The intertwining facts of the *Beam* case lead to the same conclusion.

**A. In spite of this Court's Commerce Clause Jurisprudence, the Respondents Have Retained the Essential Purpose and Effect of their Discriminatory Alcohol Tax Scheme.**

The history of the *Beam* dispute goes back at least to 1933 when the repeal of Prohibition was accomplished through the ratification of the Twenty-First Amendment to the United States Constitution.<sup>10</sup> In 1984, this Court reaffirmed that the states could not constitutionally use the Twenty-First Amendment to shield economic protectionist measures designed to favor local alcohol commerce over interstate alcohol commerce, measures such as discrimination in taxation between local and out-of-

<sup>10</sup> The Twenty-First Amendment reserved to each state certain powers with respect to the regulation of intoxicating liquors. U.S. Const. amend. XXI. By 1964, however, this Court had made it abundantly clear that the Twenty-First Amendment did not constitute a *pro tanto* repeal of the Commerce Clause. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32, 84 S. Ct. 1293, 1297-98 (1964).

state alcohol products. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984) ("*Bacchus*").<sup>11</sup>

In 1984 when *Bacchus* was decided, Georgia had in place a tax scheme that was practically identical to the Hawaii scheme struck down in *Bacchus*.<sup>12</sup> Following this Court's *Bacchus* decision, however, the Georgia General Assembly transparently sought to retain the essential purpose and effect of its alcohol taxation system, yet insulate the Georgia scheme from this Court's Commerce Clause jurisprudence. First, on March 31, 1985, the General Assembly passed a new version of the alcohol tax that imposed one, singular rate of taxation on alcoholic beverages produced in and out of the State (the "Equalized Tax"). 1985 Ga. L. 662. On the very next day, however, the General Assembly repealed the Equalized Tax (which never became effective) and replaced it with a statute (the 1985 Alcohol Tax Statute) that, with only slightly different semantics, imposed the old, discriminatory rate favoring local producers by levying a 100% higher tax on the products of their out-of-state competitors. 1985 Ga. L. 665; O.C.G.A. § 3-4-60 (current version).

The General Assembly enacted the 1985 Alcohol Tax Statute despite clear advice from counsel for Respondents

<sup>11</sup> In *Bacchus*, this Court struck down a Hawaii statute that taxed out-of-state alcohol products at a higher rate than locally manufactured alcohol products on the basis that the tax constituted impermissible, "simple economic protectionism" in violation of the Commerce Clause. 104 S. Ct. at 3058.

<sup>12</sup> Since the repeal of Prohibition, Georgia had taxed out-of-state alcohol beverages at twice the rate of locally produced alcohol beverage products. See Ga. L. 1937-38, Ex. Sess., p. 103, §§ 11, 12; O.C.G.A. § 3-4-60 (pre-1985 version, *Beam's* Cert. Pet. App. EE.)



that it would be unconstitutional.<sup>13</sup> Perhaps because of this advice, and belying any belief in the constitutionality of the 1985 Alcohol Tax Statute, the General Assembly provided that, should the discriminatory tax (the 1985 Alcohol Tax Statute) ever be held to be unconstitutional, the Equalized Tax would automatically spring into existence. 1985 Ga. L. 665, § 4.

**B. Taxpayers Were Not Able to Obtain Injunctive Relief Because the Respondents Singled Out the Refund Statute as the Appropriate Remedy.**

Shortly after the 1985 Alcohol Tax Statute was enacted, but *without the benefit of the evidence* quoted in note 13, Heublein, Inc., another out-of-state alcohol company similarly situated to Beam, filed a complaint in the Superior Court of Fulton County, Georgia, seeking declaratory and injunctive relief to challenge the constitutionality of the 1985 Alcohol Tax Statute. See Beam's Cert. Pet. App. P; R. (*Beam* (Ga. II), No. S93A1217) at 977. In response to Heublein's motion for preliminary injunction (*id.* at 986), Respondents argued that the motion should be denied because, among other things, "The result of an

<sup>13</sup> "This [1985 Alcohol Tax Statute] is the language our office is on (public) record of saying is invalid under *Bacchus*. Thus, we may hear our opinion quoted back to us in litigation over this bill. Strong move afoot to try this approach out in the courts though and see if the local tax break can be saved." R. (*Beam* (Ga. I), No. 46642) at 201, Ex. A-3 (quoting David A. Runnion, Counsel of Record in this Court for Respondents in *Beam*). Further from Mr. Runnion: "Here, where the *real desire even in the new legislation* is to favor local alcohol industries, I do not feel it would be a winning argument [that the legislation was supported by a legitimate purpose]." *Id.* at 215, Ex. A-7 at 2 (emphasis supplied). Further: "In light of the way in which the U.S. Supreme Court is headed at the moment, it is my opinion that the only way to completely assure no revenue loss to the State in this area is to amend the foregoing two statutes to impose equal tax rates . . . ." *Id.*

injunction would quite simply be *regulatory chaos*." *Id.* at 1006, p. 18 (emphasis supplied). See also *id.* at 1002, p. 14. Additionally, the Respondents successfully argued that Heublein's motion for injunctive relief should be denied because Heublein had an adequate remedy at law in the *Refund Statute*. *Id.* at 1003, p. 15; *id.* at 1038-39, pp. 25-26 ("IT IS ABSOLUTELY CLEAR THAT [HEUBLEIN] HAS ADEQUATE REMEDIES AT LAW FOR SEEKING A REFUND") (quoting counsel for Respondents). In reliance upon the Refund Statute, the trial court in *Heublein* agreed that Heublein had not established any threat of irreparable harm and denied Heublein's motion for interlocutory relief. See Beam's Cert. Pet. App. P.<sup>14</sup> The *Heublein* case and the *Waldron* case (cited in preceding footnote) show that, when confronted with a taxpayer's pre-payment challenge to a tax scheme, Respondents told the taxpayer and convinced the Georgia courts that the taxpayer was not entitled to injunctive or declaratory relief, that an injunction against the challenged tax would so disrupt the administration of tax collection in Georgia that "regulatory chaos" and a plethora of other evils would result, and that the appropriate remedy for the taxpayer was the Refund Statute.

<sup>14</sup> Subsequently, the court upheld the constitutionality of the 1985 Alcohol Tax Statute and the Georgia Supreme Court concluded that it could not reverse. *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, 196, *appeal dismissed for lack of properly presented federal question*, 483 U.S. 1013 (1987) ("*Heublein*"). See also *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989) ("*Waldron*") (Refund Statute provides adequate remedy for taxes collected pursuant to an unconstitutional tax statute so as to preclude equitable relief).



**C. Respondents and the Georgia Courts Affirmatively Represented the Refund Statute as the Appropriate Remedy for the Collection of Unconstitutional Taxes.**

During the same 1937-38 legislative session in which the original version of the alcohol tax was enacted following the repeal of Prohibition, the General Assembly also enacted the Refund Statute. 1937-38 Ga. L., Ex. Sess., p. 77, § 34 (later codified as O.C.G.A. § 48-2-35). The Refund Statute provided as follows:

(a) A taxpayer shall be *refunded any and all taxes* or fees which are determined to have been erroneously or *illegally assessed and collected* from him under the laws of this state, *whether paid voluntarily or involuntarily*, and shall be refunded interest. . . .

O.C.G.A. § 48-2-35(a) (emphasis supplied). In proposing this legislation, the Governor of Georgia stated to the General Assembly,

I am attaching a file \* \* \* showing certain taxes that have been paid into the State treasury under *laws that have since been declared unconstitutional*. There is no provision without an act of the legislature, to pay these taxes to these debtors of the State who have paid these unconstitutional taxes. This is a moral obligation of the State. I hereby recommend legislative action to provide for the repayment of these amounts. House Journal 1937, volume 1, pp. 505-567.

*Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873, 874 (1941) ("*Forrester*") (emphasis supplied). Thus, for many years, the Georgia Supreme Court recognized that the Refund Statute was enacted to provide redress for the collection of taxes later declared to be unconstitutional. *Id.*; see also

*Waldron*, 385 S.E.2d at 75 n.1.<sup>15</sup> In these many ways, Reich and Beam were affirmatively told that they need not evidence their objection to the legality of the taxes by, for instance, attempting to initiate some unspecified sort of anticipatory proceeding. In short, Georgia law gave no hint that a taxpayer should choose some remedy other than the Refund Statute.<sup>16</sup> All legislative, judicial, and

<sup>15</sup> The Refund Statute offered some advantages for everyone involved. The Refund Statute required that the taxpayer first file an administrative refund claim, giving Respondents a full year to exercise their discretion to resolve the dispute without litigation. See O.C.G.A. § 48-2-35(b)(4). Then, if the dispute were not resolved at the administrative stage, Respondents waived their sovereign immunity bar to a lawsuit and consented to a refund action against them in the Georgia courts. *Id.* If successful, the taxpayer was promised a full refund of all illegally collected taxes with interest at the rate of 9% per year from the time the taxes were collected. O.C.G.A. § 48-2-35(a). Thus, in exchange for regulatory order, efficiency, the chance to avoid litigation in state and Federal court, and continued tax collection on the front end, Respondents promised taxpayers a full refund with interest on the back end. Additionally, the Refund Statute with its "whether paid voluntarily or involuntarily" language abolished the voluntary payment doctrine as a defense available to Respondents in tax cases – a defense, by the way, that Respondents now argue retroactively against Beam. See Respondents' *Beam* Cert. Op. Brief *passim* (repeated, irrelevant references that Beam paid the tax voluntarily); see also *Hawes v. Smith*, 120 Ga. App. 158, 169 S.E.2d 823, 824 (1969) (holding voluntary payment defense is not available where there is a tax refund statute).

<sup>16</sup> In point of fact, from 1985, when Beam filed its administrative claims for refund under Georgia's Refund Statute, until this Court's 1991 decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. \_\_\_, 111 S. Ct. 2439 (1991) ("*Beam* (U.S.)"), *appeal after remand*, 263 Ga. 609, 437 S.E.2d 782 (Dec. 2, 1993) ("*Beam* (Ga. II)", *cert. petition pending*, U.S. S. Ct. Case No. 93-1140, everyone involved in the *Beam* case – including Beam, the Respondents and their counsel, and the Georgia courts – agreed that the Refund Statute was the appropriate remedy available to Beam if and only if Beam established that the taxes collected from it violated the Commerce Clause. Until then, neither the Respondents nor the Georgia courts ever suggested that Beam either had no standing to seek a refund, had not followed the proper procedure for obtaining a refund, or that the Refund Statute did not apply to unconstitutionally collected taxes. See, e.g., 1988 Fulton Superior Court



official statements and conduct on the part of the State of Georgia affirmatively directed Georgia taxpayers to utilize the Refund Statute.

**D. Reich and Beam Followed the Advice and Direction of the Respondents and the Georgia Courts and Used the Refund Statute Only to Have the Respondents and the Georgia Supreme Court Later Say When it Was Too Late to Follow Any Other Course that the Refund Statute Did Not Apply to Reich and Beam After All.**

In April 1985, Beam filed its administrative claim for refund with the Georgia Department of Revenue seeking a refund of taxes paid during the prior three-year period, *i.e.*, roughly 1982 through 1984. R. (*Beam* (Ga. I), No. 46642) at 19-20, Ex. A. Beam filed its administrative claim for refund under and in accordance with all the procedural and limitation-period requirements of the Refund Statute. *Id.* Respondents certainly did not object to Beam's proceeding under the Refund Statute during the

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Order (Beam's Cert. Pet. App. F); *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95, 97 (1989) ("*Beam* (Ga. I)") (holding that if the tax statute were unconstitutional at the time the taxes were paid, then "Georgia [would face] liability for . . . refunds. . . . Georgia would have to refund large sums of money that it has already spent" (subsequent history omitted, emphasis supplied); Transcript in the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia*, No. 89-680 (U.S.) at 24-34 ("*Beam* (U.S.) Transcript") (Respondents admitting in *judicio* that the Refund Statute provided Beam the proper remedy and that no pre-payment protest was required). Georgia case law, *see, e.g.*, *Waldron*, 385 S.E.2d at 75 & n.1; *State of Georgia v. Private Truck Counsel of Am., Inc.*, 258 Ga. 531, 371 S.E.2d 378, 380 (1988); *Ingalls Iron Works Co. v. Blackmon*, 133 Ga. App. 164, 210 S.E.2d 377, 378 (1977); *Barber v. Collins*, 201 Ga. App. 104, 410 S.E.2d 444, 445 (1991); *Marconi Avionics, Inc. v. DeKalb County*, 165 Ga. App. 628, 302 S.E.2d 384, 385-86 (1983); and *Hawes v. Smith*, 120 Ga. App. 158, 169 S.E.2d 823, 824 (1969), likewise completely confirmed the choice of the Refund Statute as the clear and certain remedy to challenge a tax statute.

two years Beam's refund claim was pending at the administrative level. When the Respondents had taken no action on Beam's administrative refund claim for the two years it had been pending, Respondents waived their sovereign immunity and Beam filed an action under the Refund Statute in the Fulton County Superior Court. *Id.* at 12. Again, if Respondents believed the Refund Statute did not apply to Beam's claim, they were silent, did not move to dismiss on that basis, and allowed the case to proceed through many years and levels of litigation. In *Beam*, the trial court found that the action was properly before it under the Refund Statute, *id.* at 244-46, ¶¶ 11-19 (Beam's Cert. Pet. App. F), but refused to grant Beam a refund by applying its holding of unconstitutionality prospectively only, *id.* at 250-52.<sup>17</sup>

Subsequently, however, this Court reversed the Georgia courts' prospective-only application of the constitutional decision in Beam's favor and held that the Pre-1985

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<sup>17</sup> In Beam's case, unlike the earlier *Heublein* case, the documents quoted above at note 13 and others generated in the course of the enactment of the 1985 Alcohol Tax Statute were produced in discovery by Respondents. These documents, which related to the purpose and effect of the 1985 Alcohol Tax Statute, contained sufficient proof to convince the trial court on summary judgment that even the Pre-1985 Alcohol Tax Statute had been violative of the Commerce Clause. *Id.* at 248, ¶ 5. In other words, the Georgia courts, faced with evidence that the statute *then in existence* had been enacted under a cloud of invidious, discriminatory, protectionist intent, used that evidence to hold the *prior* statute unconstitutional – *but* not so as to afford Beam any relief in the form of a refund or otherwise. By applying their holdings prospectively only, the Georgia courts could then deny Beam any refund for the years in which the taxes at issue had been paid. And further, because the Pre-1985 Alcohol Tax Statute had already been repealed by enactment of the Equalized Tax and then, immediately thereafter, the cosmetically altered 1985 Alcohol Tax Statute, the prospective-only holding that the Pre-1985 Alcohol Tax Statute was unconstitutional was meaningless in effect. The Georgia Supreme Court affirmed on all grounds. *Beam* (Ga. I), 382 S.E.2d at 95.

Alcohol Tax Statute was unconstitutional during the years in question and at the time for which Beam was seeking a refund. *Beam* (U.S.), 111 S. Ct. at 2439. In *Beam* (U.S.), this Court determined that the *Bacchus* holding must be applied retroactively to the taxes paid by Beam during the years in question (roughly 1982 through 1984). *Id.* at 2441.

Not to be outdone, however, the Respondents and the Georgia courts adopted a course of action to deprive the Federal Retirees and Beam of their constitutional rights.<sup>18</sup> The link between *Reich* and *Beam* was permanently welded when the Georgia Supreme Court, in its first *Reich* decision, stepped into the *Beam* case while *Beam* was still before the trial court on cross-motions for summary judgment. In *Reich* (Ga. I), the Georgia court, in an unprecedented holding that overruled prior case law and with a thinly veiled reference to *Beam*, held for the first time ever 1) that Georgia's Refund Statute "*does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid[,]*" 422 S.E.2d at 849 (emphasis supplied), and 2) that in order to recover payment of an unconstitutional tax, a taxpayer must earlier have first a) filed a protest and b) demanded a refund before or at the time the tax is paid. The Georgia court cited no statutory or other authority for either proposition, and its decision was in direct, unexplained, and irreconcilable conflict with *Forrester*, 16 S.E.2d at 873, and with *Waldron*, 385 S.E.2d at 74. The

<sup>18</sup> Upon remand from this Court, Respondents amended their Answer in *Beam*, raising for the first time numerous new, alleged procedural defenses, including claims that the Refund Statute was inapplicable, that Beam lacked standing to seek a refund, and that Beam should have availed itself of a plethora of alleged predeprivation remedies.

*Reich* (Ga. I) court, with unmistakable but flawed reference to *Beam*, grounded its decision upon the proposition that its holding "protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. Were we to interpret the [Refund S]tatute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature." 422 S.E.2d at 849 (citations omitted).<sup>19</sup>

On December 2, 1993, the Georgia Supreme Court issued its latest decisions in *Beam* and *Reich*. In *Reich* (Ga. II), the court held that *Reich* was not entitled to any relief under the Due Process Clause of the Fourteenth Amendment because he had failed to pursue certain so-called "predeprivation" remedies. The court cited its *Beam* (Ga. II) decision of the same day for this holding. 437 S.E.2d at 321. Thus, although the underlying tax systems at issue in *Reich* and *Beam* are different, the response by the Respondents and the Georgia courts to this Court's constitutional holdings in the respective cases has been identical and even more egregious than Florida's conduct reversed by this Court in *McKesson*: Eliminate the only remedy available to the taxpayer, the remedy the taxpayer had been directed to use, and the remedy the taxpayer actually used.

#### **E. Federal Due Process Prohibits the Tactic Used by Respondents and the Georgia Supreme Court against *Reich* and *Beam*.**

The shell game played by the Respondents and the Georgia courts violates the clearly enunciated due

<sup>19</sup> This argument concerning windfall, double recovery, or pass-on/standing was the very same argument made by Florida but rejected by this Court in *McKesson* as inconsistent with Commerce Clause and due process principles. See 110 S. Ct. at 2255-56.



process decisions of this Court. See, e.g., *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930) ("*Brinkerhoff*"). Therefore, even if there were now some shred of adequacy to be found in the predeprivation remedies now posited by the Respondents and the Georgia courts – and there is none – in light of the facts in these cases, Respondents' repeated affirmative representations of the Refund Statute as an appropriate remedy and Reich's and Beam's reliance thereupon to their detriment (while the time for pursuing any other course expired) estops Respondents from now denying the promised refunds and pretermits the issue of the alleged adequacy of predeprivation remedies.<sup>20</sup>

The situation in *Brinkerhoff* was closely analogous to the situation that now exists in Georgia after *Reich* and *Beam*. The plaintiff taxpayer in *Brinkerhoff* brought an equity action against a Missouri county for discriminatory taxation. The defendants answered that equitable

<sup>20</sup> The first public hint that the Respondents might tamper with the refund remedy came during the oral argument before this Court in *Beam* in 1991 when Respondents stated:

I think that Georgia, along with many States, are investigating the possibility of changing their statutes to give them greater protection, whether it be limiting the statute of limitations for a refund, or adopting a protest requirement. But in light of the change in this Court's doing away with prospectivity, I think there is a great possibility the State would feel compelled to change its refund statute.

*Beam* (U.S.) Transcript at 33. No doubt this Court did not understand by these remarks that Respondents intended to adopt all these changes retroactively against Beam and the Federal Retirees so as to attempt to deprive Beam and the Federal Retirees of any remedy at all. Likewise, this Court's recognition in 1991 in *Beam* (U.S.) that Respondents would be able to raise procedural defenses at the remedial level after remand from this Court was most certainly not an invitation to Respondents and the Georgia courts to invent new procedural bars that did not exist at the time the taxpayers paid their taxes, to scrap long-standing Georgia remedial law retroactively, and then apply newly-created rules to preclude any relief on pending claims.

relief was not available because the plaintiff had not pursued its administrative remedy. The Missouri Supreme Court agreed with the defendants that the plaintiff had an adequate remedy at law in the administrative remedy, was guilty of laches in failing to pursue that administrative remedy on a timely basis, and was therefore not entitled to equitable relief. The painfully obvious problem with this holding was that Missouri law had always provided up until the time of this holding that the administrative commission (wherewith the purported administrative remedy lay) did not have the power to grant relief from the kind of discrimination alleged by plaintiff *Brinkerhoff*. "The possibility of the relief before the tax commission was not suggested by anyone in the entire litigation until the [Missouri] Supreme Court filed its opinion . . . . Then it was too late for the Plaintiff to avail itself of the newly found remedy." *Id.* at 453. This Court reversed the Missouri Supreme Court because that court had denied the plaintiff due process. *Id.* at 453.<sup>21</sup>

<sup>21</sup> "The violation is nonetheless clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute." *Id.* at 454. Thus, the very act by the Georgia Supreme Court of construing the Refund Statute to deny relief in contradiction to its prior holdings deprived Reich and Beam of due process. In other words, state courts may not deny relief by "putting forward nonfederal grounds of decision that were without any fair or substantial support" in preexisting state law." *Ward*, 40 S. Ct. at 421 (1920); see also *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 814 (1947) (holding states cannot refuse to enforce rights because they arise from Federal law or discriminate against Federal law claims in favor of claims based on state law); see also Beam's Cert. Pet. Apps. UU and VV and part entitled "Current Events in Georgia Related to Taxpayer Relief" (describing Respondents' decision to grant refunds of casual sales tax illegal under Georgia law but not to grant refunds to Beam and Federal Retirees, taxpayers of Georgia taxes illegal under Federal law). *Beam* and *Reich* are squarely within the holdings of *Brinkerhoff*, *Ward*, and *Testa*.



**F. Consistent with Federal Due Process, Respondents Must Refund to Reich and Beam the Unconstitutionally Collected Taxes.**

Echoing its holding in *Reich* (Ga. II) at issue here, the Georgia Supreme Court held in *Beam* (Ga. II):

federal due process, as interpreted by the Supreme Court in [*McKesson* and *Harper*], does not require that the State of Georgia refund to appellant the discriminatory portion of the excise taxes . . . .

437 S.E.2d at 782. The Georgia court based this holding upon the supposed availability of certain, so-called predeprivation remedies for satisfaction of the Respondents' constitutional duty to accord taxpayers due process. *Id.* at 785-87. In the absence of any postdeprivation remedy for unconstitutionally collected taxes, only the existence of a clear and certain, duress-free, predeprivation remedy will satisfy due process. *See, e.g. McKesson*, 110 S. Ct. 2250-52.

1. Due Process Requires the Remedy 1) to Have Been Clear and Certain, 2) to Have Been a Predeprivation or Prospective Remedy, and 3) to Have Been a Constitutionally Adequate (Duress-Free) Remedy.

Most recently in *Harper*, 113 S. Ct. at 2510, this Court completely reaffirmed its due process jurisprudence formulated in such cases as *Atchison*<sup>22</sup> and *McKesson*<sup>23</sup>:

<sup>22</sup> *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 32 S. Ct. 216 (1912) (emphasis supplied). As early as 1912, Justice Holmes, writing for a unanimous Court, held that, in preservation of one's "liberty," one "who denies the legality of a tax should have a clear and certain remedy." 223 U.S. at 285-86. If a remedy, taking all circumstances together, works an "implied duress" to require payment of the tax, that remedy is inconsistent with the requirement of a clear and certain remedy. 32 S. Ct. at 217. Under the

A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before their obligations are entertained or resolved*" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a *predeprivation determination* of the tax assessment's validity." Such limitations impose constitutionally significant "'duress'" because a tax payment rendered under these circumstances must be treated as an effort "to avoid financial sanctions or a seizure of real or personal property." *The State accordingly may not confine a taxpayer under duress to prospective relief.*

circumstances of that case, the *Atchison* Court identified some three forms of duress: 1) the risk of having to "forfeit [the taxpayer's] right to do business" as one of the costs bound up with exercising a remedy, 2) the risk of having to "pay a penalty" as one of the costs associated with employing a remedy, and 3) "the risk of having [the taxpayer's] contracts disputed and its business injured" as one of the consequences associated with employing a remedy. *Id.* Other obvious forms of duress (subsequently recognized in *McKesson*) would be the risk of criminal prosecution for nonpayment and the risk of having one's goods seized and/or destroyed for nonpayment as costs associated with employing a remedy.

<sup>23</sup> In *McKesson*, this Court unanimously reaffirmed the requirement of "a clear and certain remedy." 110 S. Ct. at 2248 (citation omitted). The *McKesson* Court went on to specify two broad ways in which a state may meet its obligation to provide a clear and certain remedy for deprivation of tax monies. *First*, a state may provide a clear and certain remedy by which a taxpayer may have its "objections [to the legality of the tax] *entertained and resolved*" "*before*" the taxpayer must tender tax payments. *Id.* Further, in order to suffice as a clear and certain remedy, such a predeprivation remedy must be free of and must also be concluded prior to *any duress imposed upon the taxpayer to pay the tax*. Further, in discussing the insufficiency (as against the requirement of a clear and certain remedy) of a predeprivation or prospective remedy that imposes duress to pay the tax, the Court reaffirmed and added to the *Atchison* forms of duress. *Second*, a state may meet its obligation to provide a clear and certain remedy by providing a postdeprivation or retrospective remedy so long as that remedy provides "*meaningful backward-looking relief to rectify any unconstitutional deprivation*," *id.* at 2247 (footnote omitted, emphasis supplied); for instance, relief in the form of a refund.



*Harper*, 113 S. Ct at 2519-20 & n.10 (citation omitted, alteration original, emphasis in part supplied). Thus, when exacting taxes, a state, in order to satisfy its due process obligations, has available two broad remedial choices: It must provide at least one clear and certain, duress-free predeprivation remedy or one fully adequate postdeprivation remedy. Simply put, Georgia provides neither. In *Reich* (Ga. I), the Georgia Supreme Court retracted the only postdeprivation remedy available to any taxpayer who has paid a tax pursuant to an unconstitutional statute – the Refund Statute. Each predeprivation remedy now posited by the Georgia Supreme Court for *Reich* and *Beam* is constitutionally inadequate.<sup>24</sup>

## 2. The Administrative Remedies Cited by the Georgia Supreme Court Are Not Duress-Free And Do Not Allow a Constitutional Challenge.

For this Court's purposes in *Reich*, the predeprivation remedies upon which Respondents relied in *Beam* will serve to illustrate why retrospective relief is now the only remedial avenue open to Georgia under Federal due process. None of the statutory procedures relied upon by the Georgia court in *Beam* (Ga. II) did anything to eliminate the continuing duress designed to coerce *Beam* into continuing to purchase tax stamps in order to pay the tax

<sup>24</sup> Two members of the Georgia Supreme Court agreed, did not join in all of *Beam* (Ga. II), 437 S.E.2d at 787, and dissented in *Reich* (Ga. II), 437 S.E.2d at 322-25 ("nothing under the specific provisions of the state tax code can be said to have provided [Reich] with the opportunity for a constitutionally meaningful predeprivation challenge"; equitable or declaratory relief "does not clearly protect the taxpayer against [Respondents'] employment of its various sanctions and summary remedies which are otherwise designed to encourage timely payment of taxes prior to resolution of the dispute").

imposed under the Pre-1985 Alcohol Tax Statute.<sup>25</sup> Without risking 1) criminal prosecution, 2) the seizure and/or destruction of its property as unstamped contraband, and 3) the suspension and/or cancellation of its license, *Beam* could not have done business in Georgia or shipped its products into Georgia without *first* having affixed stamps to its products *before* they entered Georgia.<sup>26</sup> Further, 4)

<sup>25</sup> See O.C.G.A. §§ 48-2-54 (assessment notice) (*Beam's* Cert. Pet. App. PP); 50-13-12 (administrative hearing procedure) (App. SS); 3-2-11 (administrative review) (App. U).

<sup>26</sup> See, e.g., Georgia Revenue Rule § 560-2-3-.09 ("No person shall move or cause to be moved into Georgia or receive, hold, purchase, give away, sell, or offer to sell in Georgia any distilled spirits . . . unless each individual container of such distilled spirits shall have affixed thereto at all times a tax stamp showing full payment of all the taxes thereon. Tax stamps shall be purchased and affixed to containers prior to shipment" (emphasis supplied)). This Rule is Respondents' own, crystal-clear, published interpretation of O.C.G.A. § 3-4-61(a)(2), a statute which Respondents now attempt to use as the source of authority for their contention that a manufacturer's wholesalers, rather than the manufacturer, were legally responsible for purchasing and affixing tax stamps. See, e.g., Respondents' *Beam* Cert. Op. Brief at 6 & n.7. When read in the light of Respondents' many regulations and representations, however, it is clear that the "every manufacturer or wholesaler" language in O.C.G.A. § 3-4-61(a)(2), now relied on by Respondents, as a practical matter means "every manufacturer and, if for some reason not the manufacturer, then the wholesaler." Since it is the manufacturers who *first* import the product into Georgia (and thereby *first* incur the duty to purchase and affix stamps), it is only on the rare occasion of some oversight that the wholesaler ever purchased and affixed stamps. See, e.g., R. (*Beam* (Ga. II), No. S93A1217) at 583-85, ¶¶ 5-8. Much less was the legal burden to purchase and affix stamps ever shifted from the manufacturers to the wholesalers. And Respondents have themselves earlier admitted in *judicio* these facts that are contrary to their recently developed positions: "[M]anufacturers must buy tax stamps as indicia of payment of taxes, and those stamps must be affixed to the bottles prior to their importation into the state. O.C.G.A. § 3-4-61." *Id.* at 1006, p. 18 (quoting counsel for Respondents, emphasis supplied). "THOSE TAX STAMPS HAVE TO BE PLACED ON THE CONTAINERS BEFORE THE ALCOHOL REACHES THE BORDERS OF THE STATE OF GEORGIA." *Id.* at 1027, p. 14 (quoting counsel for Respondents). Respondents' transparent attempt to portray the stamp system as something other than what it was in order to buttress their pass-on/standing argument is

other licensees (wholesalers, retailers) in the Georgia system of alcohol beverage distribution and even consumers would have been subject to the risk of criminal prosecution or license suspension/cancellation for dealing in unstamped product.<sup>27</sup> And that unstamped product, as contraband, would have been subject to seizure and/or destruction in the hands of such licensees and consumers as well. These adverse consequences for other licensees and for consumers would have dissuaded such persons from doing business with Beam.

Finally, 5) Beam would have been subject to the risk of severe civil penalties by not paying the tax.<sup>28</sup> Even if

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exposed by another fact as well: Beam's prior offer to recover on behalf of its wholesalers (whom Respondents repeatedly assert are the real parties in interest) was completely ignored by Respondents. See R. (*Beam* (Ga. II), No. S93A1218) at 72-78.

<sup>27</sup> See O.C.G.A. §§ 3-1-4 (violation a misdemeanor) (Beam's Cert. Pet. App. S); 3-2-3 (Rev. Dept. may deny, suspend or cancel license to do business) (App. T); 3-2-33 (unstamped liquor is contraband, which must be destroyed immediately) (App. W); 3-2-34 (same) (App. X); 3-2-36 ("shall secure warrants or other criminal process . . . shall prosecute") (App. Y); 3-3-1 (privilege to deal in alcoholic beverages in Georgia) (App. Z); 3-3-3 (license requirement) (App. AA); 3-3-9 (violation of these provisions is a misdemeanor) (App. BB); 3-3-27 (felony and misdemeanor) (App. CC); 3-3-29 ("no person knowingly and intentionally shall possess, sell, or purchase any distilled spirits not bearing proper tax stamps") (App. DD).

<sup>28</sup> If a taxpayer fails to pay a tax, the Revenue Department issues an Official Notice of Assessment and Demand for Payment, whereby a "Demand is hereby made for immediate payment of the amount shown above" and a further warning is made as follows:

A state tax execution is being issued in the amount of this assessment unless immediate payment in full is received at the office indicated herein, the [writ of] fi[eri] fa[cias] will be recorded and levied upon any property you own. If necessary, other procedures authorized by law, including attachment and garnishment, will be resorted to in order to enforce payment. You may judicially contest, upon certain conditions, any such levy upon your property, and if you pay the assessment as

Beam had chosen to violate Georgia's tax stamp laws, awaited receipt of an assessment notice, and filed an appeal from the notice pursuant to O.C.G.A. § 48-2-59 (Beam's Cert. Pet. App. RR) (cited by the *Beam* (Ga. II) court below as a clear and certain predeprivation remedy), yet further obligations would have been imposed. See O.C.G.A. § 48-2-59(c) (security bond for tax *plus* interest *plus* costs). Further, whenever the Revenue Department issues an assessment (regardless of any appeal), the law imposes yet other penalties and interest charges. See O.C.G.A. §§ 3-2-11 (Beam's Cert. Pet. App. U), 48-2-44 (App. OO), 48-2-40 (App. NN).<sup>29</sup>

Furthermore, the procedure described in O.C.G.A. § 50-13-12 by its very terms, did not apply to a claim challenging the constitutionality of a Georgia statute.<sup>30</sup> The same is true of the administrative assessment and appeal provisions related specifically to the collection of

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required or if it is collected you may seek a refund, again upon certain conditions.

<sup>29</sup> The Georgia court's suggestion that, because of the *discretionary* waiver provision set forth in O.C.G.A. § 3-2-12 (Beam's Cert. Pet. App. V), Beam should have shipped unstamped, bootleg spirits into Georgia and awaited an assessment notice without legitimate concern over adverse consequences rings hollow. The *McKesson* Court described the types of sanctions and summary remedies it had in mind; see 110 S. Ct. at 2251 n.20: "warrant . . . to levy upon and sell," "penalty," "interest," and "revo[cation of] license." The forms of duress brought to bear upon Beam to make sure that Beam paid its taxes prior to shipping its product into Georgia are precisely the types of duress deemed impermissible in *Atchison* and specifically recognized in *McKesson* ("sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved," *id.* at 2251 (emphasis original)), and, further, regarded as mandating clear and certain *retrospective* relief.

<sup>30</sup> This procedure contemplates a challenge to either a) an "act of the Department in a matter involving . . . liabilities for taxes," b) a "failure of the Department to act in such a matter," or c) an "order of the Department in such a matter." O.C.G.A. § 50-13-12(a) (emphasis supplied).



taxes in O.C.G.A. §§ 48-2-54, *et seq.* Nowhere is the Revenue Commissioner given the authority to declare unconstitutional an act of the legislature.<sup>31</sup>

3. **A Suit for Declaratory/Injunctive Relief was not a Clear and Certain, Duress-Free Remedy Available to Reich or Beam.**

The Georgia court erred in holding that Georgia's clear and certain remedy lay, not in the Refund Statute, but in a general suit for declaratory relief under O.C.G.A. §§ 9-4-1, *et seq.* (Beam's Cert. Pet. App. GG, HH and II), coupled with a motion for emergency injunctive relief under O.C.G.A. § 9-11-65 (App. KK). *Indeed, a Georgia defendant may handily defeat a suit in equity or a declaratory judgment action by merely pointing out the availability of an alternative statutory procedure.*<sup>32</sup> The

<sup>31</sup> The general principle of law that a mere agency cannot review the acts and statutes passed by the General Assembly quite plainly confirms the only clear and certain meaning and scope of these administrative procedures. *See, e.g., George v. Department of Natural Resources*, 250 Ga. 491, 299 S.E.2d 556, 557 (1983) (no agency jurisdiction under the Georgia APA to entertain challenge to constitutionality of statute); *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895, 896 (1975); *Ledford v. Dep't of Transp.*, 253 Ga. 717, 324 S.E.2d 470, 471 (1985) (same).

<sup>32</sup> *See, e.g., Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739, 742 (1988); *Georgia Pub. Serv. Comm'n v. Southern Bell*, 254 Ga. 244, 327 S.E.2d 726, 728 (1985); *Schieffelin & Co. v. Strickland*, 253 Ga. 385, 320 S.E.2d 358, 360-61 (1984); *Newsome v. Brown*, 252 Ga. 421, 314 S.E.2d 225, 226 (1984); *Benton v. Gwinnett County Bd. of Educ.*, 168 Ga. App. 533, 309 S.E.2d 680, 682 (1983); *George*, 250 Ga. 491, 299 S.E.2d at 557-58 ("courts should not render declaratory judgments where other statutory remedies have been specifically provided." (emphasis supplied)); *Brogdon v. State Bd. of Veterinary Medicine*, 244 Ga. 780, 262 S.E.2d 56, 57-58 (1979); *Guice v. Pope*, 229 Ga. 136, 189 S.E.2d 424, 426 (1972); *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4, 7 (1972); *Shippen v. Folsom*, 200 Ga. 58, 35 S.E.2d 915, 916-17 (1945); *Forrester*, 16 S.E.2d at 875; *see also Cantrell v. Henry County*, 250 Ga. 822, 301 S.E.2d 870, 872 (1983). Thus, even though the Georgia declaratory judgment statute states

possibility of a suit in equity for declaratory/injunctive relief, moreover, does nothing to eliminate the duress upon the taxpayer throughout the pendency of the suit (and appeals thereafter) to continue paying the tax. This precise point was recognized by Justice Holmes when he wrote for this Court that, even if the taxpayer "should seek an injunction . . . , he would run the same risk as if he waited to be sued." *Atchison*, 32 S. Ct. at 217. The only hope for actual prospective relief under this scenario would be to obtain interim injunctive relief while the declaratory proceeding goes forward. Under Georgia law, however, the grant or denial of interlocutory equitable relief lies within the discretion of the trial court.<sup>33</sup> This discretion excludes declaratory/injunctive relief from the

that the availability of another remedy will not preclude declaratory relief, *see* O.C.G.A. § 9-4-2(c), the Georgia Supreme Court has authoritatively ruled that, this language notwithstanding, "courts should not render declaratory judgments where other statutory remedies have been specifically provided." *George*, 299 S.E.2d at 558 (emphasis supplied); *see also Rybert*, 368 S.E.2d at 742.

Respondents often attempt to avoid this long line of authority by citing Georgia cases that involved injunctive or declaratory relief in general but that are silent on the specific issue of the preclusion of injunctive/declaratory relief by a specific statutory remedy. Obviously, the preclusion issue will not arise, for instance, if there is no applicable statutory procedure or if the issue is not raised as a defense or on appeal.

<sup>33</sup> *See* O.C.G.A. § 9-5-8 (Beam's Cert. Pet. App. JJ) (providing the power to grant any injunction "shall be prudently and cautiously exercised and, except in clear and urgent cases should not be resorted to"); *Beck v. Glaze*, 230 Ga. 593, 198 S.E.2d 283, 284 (1973); *Davies v. Curry*, 230 Ga. 190, 196 S.E.2d 382, 384 (1973); *Apostolic Overcoming Holy Church of God v. Davis*, 228 Ga. 36, 183 S.E.2d 745, 747 (1971); *Carpenters Local Union No. 3024 v. United Broth. of Carpenters and Joiners of America*, 220 Ga. 596, 140 S.E.2d 876, 878 (1965); *see also* O.C.G.A. § 48-7-84 (providing that "[n]o action for the purpose of restraining the assessment or collection of any [income tax] shall be maintained in any court").

"clear and certain" category. See *Reich* (Ga. II), 237 S.E.2d at 325 (Carley, J., dissenting).

Further, the availability to Respondents of a sovereign immunity defense to any action *not* under the Refund Statute likewise renders any such remedy unclear and uncertain. As a general rule, Respondents are immune from declaratory judgment actions.<sup>34</sup> The exception to this general rule is a statutory waiver of sovereign immunity, as in the Refund Statute.<sup>35</sup> The same is true with respect to all equitable relief in general.<sup>36</sup>

Finally, the Georgia court's decisions in *Reich* (Ga. II) and *Beam* (Ga. II) ignore the historical fact that equitable relief to enjoin the tax stamp obligation *was in fact sought and squarely denied*. As in the *Heublein* case discussed above at Part II.B. and as in several cases discussed by Reich, Respondents have successfully argued in Georgia

<sup>34</sup> See *C.W. Mathews Co. v. Dep't of Trans.*, 160 Ga. App. 265, 286 S.E.2d 756, 757 (1981); *Health Facility Investments, Inc. v. Georgia Dep't of Human Resources*, 238 Ga. 383, 233 S.E.2d 351, 353 (1977). See generally Ga. Const. Art. 1, § 2, ¶ 9 (1990).

<sup>35</sup> See *Self v. City of Atlanta*, 259 Ga. 78, 377 S.E.2d 674, 676 (1989); *Georgia State Board of Dental Examiners v. Daniels*, 137 Ga. App. 706, 224 S.E.2d 820, 821 (1976); *Salter* (Petitioner's Appendix A in *Reich*).

<sup>36</sup> In *Henderson*, 195 S.E.2d at 7, for example, the Georgia Supreme Court denied equitable relief in the form of mandamus, holding that it was only pursuant to the Refund Statute and not pursuant to equitable jurisdiction that Respondents had waived their sovereign immunity, thus precluding other types of action: "The State has waived her sovereign immunity only to the extent provided by the express terms of this statute." *Id.* at 6. In *Musgrove v. Georgia R.R. & Banking Co.*, 204 Ga. 139, 49 S.E.2d 26 (1948), appeal dismissed, 335 U.S. 900 (1949), the Georgia courts dismissed a taxpayer case seeking equitable relief on the basis that the state had not waived sovereign immunity. Further, to the extent any equity action might remain viable, it would be an action against state officials in their *individual* capacities, which would expose the taxpayer to the risk that the state officials would not be able to satisfy an order. That, too, shows that Reich and Beam had no clear and certain predeprivation remedy.

courts that regulatory and administrative "chaos," assertedly contrary to the public interest, would result if taxpayers were not first required to pay the tax and then utilize the statutory cause of action provided in the Refund Statute. Put in stark and simple terms, if a taxpayer with Federal constitutional claims sued in equity to enjoin the tax, the taxpayer was unceremoniously poured out of court and told bluntly by both Respondents and the Georgia courts to bring a proceeding under the Refund Statute. If, on the other hand, the taxpayer follows the clear and certain legislative, judicial, and official directive, as Reich and Beam have done, the taxpayer is told, *long after the fact and long after it is too late to do anything about it*, that the taxpayer should, alas, have brought a suit in equity to enjoin the tax and that the taxpayer has no remedy now. Under these circumstances, therefore, Respondents should be estopped from even arguing the availability of predeprivation remedies on this *post hoc* basis. See *Brinkerhoff*, 50 S. Ct. at 451.

## CONCLUSION

For all the foregoing reasons Beam respectfully requests that this Court reverse the Georgia Supreme Court's decision in *Reich* (Ga. II), render judgment to Charles J. Reich for the amount of the taxes unconstitutionally collected from him by Respondents, plus interest at the rate of at least 9% per year since the taxes were collected. Further, Beam respectfully requests that this Court grant its pending petition for writ of certiorari, reverse the Georgia Supreme Court's decision in *Beam*, and render judgment to Beam in the amount of



\$2,252,096.75, with interest at the rate of at least 9% per year since the taxes were collected.<sup>37</sup>

Respectfully submitted,

*Counsel for Amicus Curiae:*

MORTON SIEGEL\*

SIEGEL, MOSES, SCHOENSTADT &  
WEBSTER, P.C.

One Illinois Center  
111 East Wacker Drive, Suite 2800  
Chicago, Illinois 60601-4798  
Telephone: 312/540-4300

JOHN L. TAYLOR, JR.

CELESTE MCCOLLOUGH

MATTHEW L. HESS

JEFFERY T. COLEMAN

VINCENT, CHOREY, TAYLOR & FEIL

A Professional Corporation

The Lenox Building, Suite 1700

3399 Peachtree Road, N.E.

Atlanta, Georgia 30326

Telephone: 404/841-3200

\*Counsel of Record

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<sup>37</sup> The Respondents have stipulated that Beam paid a total of \$2,252,096.75 in taxes under the unconstitutional Pre-1985 Alcohol Tax Statute during the three-year period corresponding to the three-year limitations period for Beam's claim under the Refund Statute (April 25, 1982 through December 31, 1984). R. (*Beam* Ga. II), S93A1217) at 18; see O.C.G.A. § 48-2-35(b)(1). Because the Pre-1985 Alcohol Tax Statute taxed out-of-state producers at twice the rate of in-state producers, the total discriminatory portion of Beam's tax payments was \$1,126,048.37. Although the Refund Statute does not apply to Beam in light of *Reich*, Beam respectfully submits that its three-year limitations period and interest rate of 9% are the most analogous and appropriate state law provisions under the circumstances. But for the discrimination against Georgia taxpayers with Federal claims, these provisions would have applied.

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No. 93-908

Supreme Court, U.S.  
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In The  
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October Term, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS and THE GEORGIA  
DEPARTMENT OF REVENUE,

*Respondents.*

On Writ Of Certiorari  
To The Supreme Court Of Georgia

RESPONDENTS' OBJECTION TO MOTION  
BY JAMES B. BEAM DISTILLING CO.  
FOR LEAVE TO FILE AMICUS BRIEF  
IN SUPPORT OF PETITIONER

WARREN R. CALVERT  
Senior Assistant Attorney General  
(Counsel of Record for Respondents)

MICHAEL J. BOWERS  
Attorney General

DANIEL M. FORMBY  
Senior Assistant Attorney General

*Attorneys for Respondents*

Georgia Department of Law  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300  
(404) 656-3370

5 pp



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Respondents in the above-styled action respectfully object to the motion by James B. Beam Distilling Co. ("Beam") for leave to file an amicus brief in support of Petitioner. Respondents readily gave their consent to all other amici wishing to file in support of Petitioner. See *Brief of Committee On State Taxation As Amicus Curiae In*

*Support Of Petitioner; Brief Of Tax Executives Institute, Inc. As Amicus Curiae In Support Of Petitioner; Brief Amici Curiae Of The National Association Of Retired Federal Employees, et al. In Support Of Petitioner.* Such consent was not given to Beam because of the Respondents' well-founded concerns that Beam would not confine its brief to matters relevant to this case, but would instead try to argue the merits of Beam's own case, now pending on petition for certiorari. See *James B. Beam Distilling Co. v. State of Georgia*, United States Supreme Court, No. 93-1140 ("Beam"). The amicus brief submitted with Beam's motion bears out these concerns.

Beam's proposed amicus brief is a thinly disguised brief on the merits in Beam's own case. For example, Beam's brief asserts that "McKesson[] firm[ly] reject[ed] . . . the pass-on/standing defense". Beam's Amicus Brief, p. 5. Beam also claims that the standing defense upheld by the Georgia Supreme Court in Beam's case is not an independent and adequate state law basis upon which to deny Beam relief, *id.* at 3 n.2, and discusses Georgia's alcohol system at length, *see, e.g., id.* at 8-10, 22-25, all of which are matters completely irrelevant to the instant case. Beam even goes so far as to advance a theory which the Petitioner in this case has not advanced, to wit, that Respondents are "estop[ped] . . . from now denying . . . refunds[, which] pretermits the issue of the alleged adequacy of predeprivation remedies." *Id.* at 18.

Moreover, the grant of certiorari in this case was limited. The Court declined to consider Petitioner's

argument that the Georgia Supreme Court, by virtue of its construction of Georgia's refund statute, deprived the Petitioner of an alleged statutory right to a refund, in violation of Due Process. The Petitioner's argument in this respect was principally based on *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) ("*Brinkerhoff*"). Although the *Brinkerhoff* issue is not involved in the instant case, a good portion of Beam's proposed amicus brief concerns the issue. *See, e.g.,* Beam's Amicus Brief, pp. 17-19, n.21, *etc.*

Beam makes its intentions clear when it states that "[t]his Court should reverse the lower court . . . in . . . Beam and grant . . . a refund of the unconstitutionally collected taxes". *Id.* at 1. Beam's arguments can be addressed if the Court accepts Beam's case for review. Until then, the Respondents should not be forced to divert time and attention away from the important issues in this case to deal with the separate, distinct, and unrelated matters which Beam wants to litigate. "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court." U.S. Sup. Ct. Rule 37.1. However, "[a]n *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored." *Id.*



For all of the foregoing reasons, Respondents respectfully submit that Beam's motion should be denied.

Respectfully submitted,

WARREN R. CALVERT  
Senior Assistant Attorney General  
(Counsel of Record for Respondents)

MICHAEL J. BOWERS  
Attorney General

DANIEL M. FORMBY  
Senior Assistant Attorney General

*Attorneys for Respondents*

Georgia Department of Law  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300  
(404) 656-3370

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In The  
Supreme Court of the United States

October Term, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS AND THE  
GEORGIA DEPARTMENT OF REVENUE,

*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of Georgia

BRIEF OF ALABAMA, ARIZONA, FLORIDA,  
HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS,  
LOUISIANA, MINNESOTA, MISSOURI, MONTANA,  
NEW HAMPSHIRE, NEW JERSEY, NORTH  
DAKOTA, OKLAHOMA, PENNSYLVANIA,  
TENNESSEE, TEXAS, UTAH, VERMONT,  
WASHINGTON, WISCONSIN AND VIRGINIA AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS

JAMES S. GILMORE, III  
Attorney General of the  
Commonwealth of Virginia

DAVID E. ANDERSON  
Chief Deputy Attorney  
General

CATHERINE C. HAMMOND  
Deputy Attorney General

ROGER L. CHAFFE  
GREGORY E. LUCYK\*  
Senior Assistant Attorneys  
General

CYNTHIA W. COMER  
BARBARA H. VANN  
Assistant Attorneys  
General

101 North Eighth Street  
Richmond, Virginia 23219  
(804) 786-0082

\*Counsel of Record for Amici Curiae

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## LIST OF ATTORNEYS GENERAL

THE HONORABLE JAMES H. EVANS  
Attorney General of Alabama  
State House  
11 South Union Street  
Montgomery, Alabama 36130

THE HONORABLE GRANT WOODS  
Attorney General of Arizona  
1275 West Washington  
Phoenix, Arizona 85007

THE HONORABLE ROBERT BUTTERWORTH  
Attorney General of Florida  
PL 01, The Capitol  
Tallahassee, Florida 32399-1050

THE HONORABLE ROBERT A. MARKS  
Attorney General of Hawaii  
425 Queen Street  
Honolulu, Hawaii 96813

THE HONORABLE ROLAND W. BURRIS  
Attorney General of Illinois  
100 West Randolph Street  
Chicago, Illinois 60601

THE HONORABLE PAMELA CARTER  
Attorney General of Indiana  
219 State House  
Indianapolis, Indiana 46204

THE HONORABLE BONNIE J. CAMPBELL  
Attorney General of Iowa  
Hoover State Office Building  
Des Moines, Iowa 50319

THE HONORABLE ROBERT T. STEPHAN  
Attorney General of Kansas  
301 West 10th  
Topeka, Kansas 66612-1592

THE HONORABLE RICHARD P. IEYOUNG  
Attorney General of Louisiana  
Department of Justice  
P.O. Box 94005  
Baton Rouge, Louisiana 70804-9005

THE HONORABLE HUBERT H. HUMPHREY, III  
Attorney General of Minnesota  
102 State Capitol  
St. Paul, Minnesota 55155

THE HONORABLE JEREMIAH W. (JAY) NIXON  
Attorney General of Missouri  
Supreme Court Building  
P.O. Box 899  
Jefferson City, Missouri 65102

THE HONORABLE JOSEPH P. MAZUREK  
Attorney General of Montana  
Justice Building  
P.O. Box 201401  
Helena, Montana 59620-1401

THE HONORABLE JEFFREY R. HOWARD  
Attorney General of New Hampshire  
25 Capitol Street  
Concord, New Hampshire 03301

THE HONORABLE DEBORAH T. PORITZ  
Attorney General of New Jersey  
Hughes Justice Complex  
CN 080  
Trenton, New Jersey 08625

THE HONORABLE HEIDI HEITKAMP  
Attorney General of North Dakota  
State Capitol  
600 East Boulevard Avenue  
Bismarck, North Dakota 58505-0040



THE HONORABLE SUSAN B. LOVING  
Attorney General of Oklahoma  
State Capitol Building  
Room 112  
Oklahoma City, Oklahoma 73105

THE HONORABLE ERNEST D. PREATE, JR.  
Attorney General of Pennsylvania  
Strawberry Square  
Harrisburg, Pennsylvania 17120

THE HONORABLE CHARLES W. BURSON  
Attorney General and Reporter of Tennessee  
500 Charlotte Avenue  
Nashville, Tennessee 37243-0497

THE HONORABLE DAN MORALES  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

THE HONORABLE JAN GRAHAM  
Attorney General of Utah  
236 State Capitol Building  
Salt Lake City, Utah 84114

THE HONORABLE JEFFREY L. AMESTOY  
Attorney General of Vermont  
109 State Street  
Montpelier, Vermont 05609-1001

THE HONORABLE CHRISTINE O. GREGOIRE  
Attorney General of Washington  
P.O. Box 40100  
Olympia, Washington 98504-0100

THE HONORABLE JAMES E. DOYLE  
Attorney General of Wisconsin  
Room 114 East, State Capitol  
Madison, Wisconsin 53702

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## INTEREST OF AMICI CURIAE

This brief in support of Georgia is submitted on behalf of Alabama, Arizona, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Virginia pursuant to Supreme Court Rule 37.

The Court's decision five years ago in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), triggered suits for tax refunds in twenty-four states. In *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2519 (1993), the Court held that, while *Davis* applied retroactively under federal law, tax refunds were not necessarily required under federal law. The Court remanded *Harper* to the Supreme Court of Virginia for the express purpose of allowing the state court to determine whether the state provides its taxpayers an adequate opportunity to challenge the validity of a tax prior to payment. The Court also remanded cases presenting the same issue to the courts of Georgia, Montana, New York, North Carolina and South Carolina. *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993), is the first of the remanded cases to reach final decision in a state court on the question of the adequacy of a state's pre-deprivation remedies. The Georgia Supreme Court held in *Reich* that "there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax." 263 Ga. at 604, 437 S.E.2d at 322.

The issues presented in this case reach far beyond the litigation generated by *Davis* and threaten to disrupt each



and every state's system for the assessment, enforcement, collection and refund of taxes. Each state legislature establishes its own system of tax collection and refund procedures based on obtaining a fair balance between providing taxpayers an adequate opportunity to contest a tax assessment and providing the state the means to collect and to retain the revenues necessary to operate. If the Court does not recognize fully states' need to have both the means to enforce payment of taxes and the ability to limit refunds of taxes paid, states will be unable to collect needed revenues and to rely on the stability of their revenue collections.

For the above reasons, Amici States have a direct and abiding interest in the issue now before this Court.

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### SUMMARY OF ARGUMENT

This case presents another opportunity for the Court to answer the question presented in some form in four cases decided by the Court in the past four years: *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991); and *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). The question is to what extent the Due Process Clause of the United States Constitution imposes an obligation on states to refund taxes alleged by a taxpayer to be unconstitutional.

This Court has stated clearly in two of those recent decisions that if a state offers taxpayers a meaningful

opportunity to challenge a tax assessment prior to payment, this procedural safeguard is "sufficient by itself to satisfy the Due Process Clause." *Harper*, 113 S. Ct. at 2519; *McKesson*, 496 U.S. at 38 n.21. This statement acknowledges a state's need to rely on the presumptive constitutionality of its tax statutes and on the revenues collected in good faith under those statutes. Otherwise, all revenues collected are only conditionally in the state's treasury. The state is exposed to the constant threat of disruption to its fiscal stability. As this Court has recognized, states may avoid that threat by establishing adequate pre-deprivation remedies for invalid tax assessments.

In reality, however, that option does not exist if the pre-deprivation remedies must satisfy a due process standard that prevents the state from including within its system procedures to enforce the collection of taxes. To suggest, as Petitioner does in this case, that no prepayment procedure is "meaningful" under due process analysis unless the procedure exposes the taxpayers to no risks or sanctions establishes a due process standard that is impossible for states to satisfy without relinquishing their ability to enforce the collection of taxes. The result is to make meaningless the Court's pronouncements in *McKesson* and in *Harper*.

Finally, each state must be allowed the flexibility to establish a tax collection and refund system that, viewed as a whole, satisfies federal constitutional standards. In the cases decided in the past four years, the Court repeatedly has acknowledged the authority of the state courts, in the first instance, to determine remedial issues in state tax cases. *American Trucking Ass'ns v. Smith*, 496 U.S. at

206 (Stevens, J., dissenting); *Beam*, 111 S. Ct. at 2448; *Harper*, 113 S. Ct. at 2520. The policy supporting this deference to the states is clear. Each state's system is unique, and its constitutional sufficiency is not dependent on the inclusion or exclusion of specific components or on how it compares to another state's system. There is no federal requirement that each state provide the same remedial process; the only requirement is that each state provide remedial procedures that satisfy the minimum demands of federal due process. Amici States urge the Court, as it decides what constitutes the minimum required due process in tax cases and whether Georgia's system satisfies this minimum, to acknowledge that each state retains flexibility to enact its own system and to determine, in the first instance, whether the system affords due process.

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### ARGUMENT

#### I. To Maintain Financial Stability, States Should Be Able to Extinguish Post-Deprivation Liability to Refund Taxes by Providing Adequate Pre-Deprivation Relief.

A United States Supreme Court decision declaring a state tax unconstitutional may expose states throughout the nation to an unanticipated past liability, possibly totaling billions of dollars. Virginia alone is exposed to a potential liability of \$707 million as a result of this Court's ruling in one case, *Davis v. Michigan*.

The Court has recognized the harm caused if states are not allowed to rely in good faith on the presumptive

constitutionality of their tax statutes and the revenues they generate, but must endure the constant threat of financial disruption caused by post-deprivation remedial relief. States may avoid this threat by providing adequate pre-deprivation remedies. Giving taxpayers a meaningful opportunity to challenge a tax assessment prior to payment is a procedural safeguard "sufficient in itself to satisfy the Due Process Clause" of the United States Constitution. *Harper*, 113 S. Ct. at 2519; *McKesson*, 496 U.S. at 38 n.21.

This result is fair to both the taxpayer and the government. A taxpayer has an opportunity to contest the validity of a tax and, if he fails to do so before paying it, must be content with future relief. If the taxpayer fails to contest the validity of the tax before paying, the state may rely on the revenues collected in good faith reliance on its tax statutes. The taxpayer has a choice; the state has a choice.

If, in giving taxpayers this option, however, the state cannot also include reasonable methods in its tax system to enforce the collection of taxes in general, the choice provided the state is illusory. No state will be able to comply with a pre-deprivation due process standard that ties the government's hands and prevents it from collecting validly assessed taxes. If that standard is applied, states' only choice will be either to forego effective and expeditious tax collection or to provide post-deprivation relief. This result makes meaningless the Court's pronouncements in *McKesson* and in *Harper*.



## II. The Due Process Standard Applicable to Pre-Deprivation Tax Remedies Should Consider the Legitimate Interest of the States to Enforce the Collection of Taxes.

Of particular concern to the states in the recent retroactivity cases before the Court has been the effect of a federal decision declaring a state tax unconstitutional on a state's obligation to provide retroactive remedial relief. It is clear from the cases that, "[s]ubject to possible constitutional thresholds," the remedial effect under state law of a retroactive federal decision is governed by state law. *Beam*, 111 S. Ct. at 2443. The constitutional threshold to which states are subject is the requirement to "provide procedural safeguards" that "satisfy the commands of the Due Process Clause." *McKesson*, 496 U.S. at 36-37. Thus, while states are free to establish their own remedial procedures, "federal law sets certain minimum requirements." *American Trucking Ass'ns v. Smith*, 496 U.S. at 178-79.

It is also clear that a state may satisfy its constitutional obligation to provide taxpayers with adequate procedural safeguards in two ways, through a pre-deprivation process or through a post-deprivation process. Federal due process does not require states to provide both; an adequate pre-deprivation process alone is sufficient. *Harper*, 113 S. Ct. at 2519; *McKesson*, 496 U.S. at 38 n.21. The choice of whether to provide pre-deprivation or post-deprivation due process is left to the states.<sup>1</sup>

<sup>1</sup> Petitioner suggests that Georgia's pre-deprivation procedure was not "clear and certain" because a post-deprivation refund procedure was also available. Brief for Petitioner at 27

The remaining question, presented in this case, is what type of pre-deprivation process satisfies the minimum demands of federal due process in state tax cases. While this precise issue may be new, the Court's approach to due process issues is firmly grounded in precedent. This precedent requires a balancing of the interests at stake in each particular case.

### A. Due process is a flexible standard that is based on a balancing of the interests at stake.

Due process is founded on notions of fundamental fairness. *Wolff v. McDonnell*, 418 U.S. 539 (1974). It is not a concept to be determined formalistically; rather, the specific dictates of due process vary with each factual situation. *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (due process requirements depend on analysis of all relevant factors); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (very nature of due process negates any concept of inflexible procedures universally applicable to every situation). Once it is determined that due process applies, the question remains what process is due under the circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Deciding whether procedures are constitutionally sufficient requires courts to balance the governmental and

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("Regardless of the merit of any other remedy, the purported availability of the refund statute made Georgia's entire remedial scheme unclear and uncertain."). There is no federal requirement that a state choose between pre-deprivation and post-deprivation procedures. While a state must provide one or the other, nothing prohibits it from offering both. See *McKesson*, 496 U.S. at 52 n.36 (state law may provide relief beyond demands of federal due process).

private interests involved in each case. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

This balancing process naturally leads to different results under different facts, as seen by comparing the facts and the results in *Goldberg v. Kelly*, 397 U.S. 254 (1974), with those in *Mathews v. Eldridge*. In *Goldberg*, the Court considered whether a welfare recipient was entitled to an evidentiary hearing before termination of benefits. The Court held that the governmental interest in protecting public funds did not, under the facts, outweigh the welfare recipient's "brutal need" for continuing benefits. 397 U.S. at 261. Accordingly, the recipient's right to object in writing before termination was held not sufficient under due process; a hearing was required.

The issue in *Mathews* was whether the Due Process Clause likewise required an evidentiary hearing before termination of Social Security disability benefits. Both the district court and the circuit court of appeals held that, based on *Goldberg*, due process required such a hearing. The Supreme Court disagreed, holding that, in this instance, the opportunity for the recipient to submit written objections satisfied due process. Unlike the welfare recipients in *Goldberg*, the recipients of disability benefits could show no "brutal need" for the continuation of benefits, pending a final determination, that would offset the government's interest in denying benefits to potentially ineligible recipients.

Generally, since *Mathews*, the federal courts have engaged in a balancing of specific facts to determine whether a pre-deprivation remedy is required, and

whether the remedy is adequate. The facts to be considered are

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.

In the case before us, the governmental interest to be weighed is the ability of the states to include within their tax collection, enforcement and refund systems reasonable sanctions and penalties to enforce the collection of taxes and other limits on the form of pre-deprivation relief available. States' fiscal stability indisputably depends on their ability to collect taxes and on their ability to retain the taxes collected.

**B. States must be able to include financial sanctions within their pre-deprivation process in order to enforce the collection of validly assessed taxes.**

In *Harper*, the Court noted the *McKesson* holding that a state incurs an obligation to provide meaningful backward-looking relief when it " 'places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality.' " 113 S. Ct. at 2519 n.10, quoting



*McKesson*, 496 U.S. at 31. The Court further suggested how the *McKesson* post-payment standard might apply in the pre-payment context:

A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before* their objections are entertained or resolved" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity."

*Id.* at 2519-20 n.10, quoting *McKesson*, 496 U.S. at 38.

Based on this footnote in *Harper*, Petitioner argues that any financial sanction in a state tax system that "prompts" or "encourages" taxpayers to tender tax payments constitutes "duress." According to Petitioner, if a state chooses to give taxpayers a pre-deprivation process, the process does not satisfy the minimum constitutional demands of due process unless a taxpayer may use that process without risk, even if he loses and even if his claim is without merit. In other words, the state must not only give the taxpayer a remedy; it must also guarantee the taxpayer's success in obtaining that remedy. This cannot be correct. Surely, due process does not place such an onerous burden on the states and grant taxpayers such a magnanimous benefit.<sup>2</sup>

<sup>2</sup> A prime example of this unbalanced view is found in the Brief Amici Curiae of the National Association of Retired Federal Employees ("NARFE"), *et al.*, at 13, at which Amici argue

Most tax assessment statutes are without question constitutionally valid, and most tax systems contain sanctions against taxpayers who fail to pay tax assessments in a timely manner. These sanctions are not "designed" to coerce taxpayers into paying their taxes before any objections to the validity of the tax will be "entertained or resolved." They are designed to enable states to enforce collection of validly assessed taxes. The argument that these mechanisms place such "duress" on taxpayers that they are compelled to pay first and complain later fails to take into account the legitimate interest of the states in "prompting" or "encouraging" taxpayers to pay *valid* tax assessments. The absence of such mechanisms would deprive states of the timely receipt of necessary revenues and would invite frivolous challenges to tax assessments. A proper balancing of interests must give substantial weight to the states' interest in enforcing the collection of valid taxes.

Moreover, the argument that the possibility of financial sanctions for nonpayment creates "duress" is flawed on several grounds. Under Georgia law (and that of numerous other states), a taxpayer may bring a pre-deprivation declaratory judgment action to contest the validity of a tax statute. If that action is resolved before the taxes are due, as will often be the case if the taxpayer acts promptly and directly instead of waiting for a court

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that for a state's pre-deprivation procedures to satisfy federal due process, the procedures must

*guarantee* the taxpayer that if he pursues this route, he will be immune from all criminal and economic sanctions, including penalties, liens, seizures of property, and above market interest, *regardless of whether he loses.*

ruling that a similar tax statute in another state is invalid, there is no possibility of financial sanctions or any other risk.<sup>3</sup> Further, even if the action is not resolved prior to the date the taxes are due, there will be no financial sanctions for delayed payment if the taxpayer ultimately succeeds in his challenge, because there can be no penalty or interest charged if the tax was never owed. Petitioner in this case wants more. He wants to be allowed not to pay a tax when due, challenge the validity of that tax, lose his challenge, and, only then, to pay the tax with no penalty or interest. This demand is unreasonable and would seriously undermine legitimate state efforts to collect valid taxes. Taxpayers could, without risk, postpone the timely payment of taxes by instituting a challenge, no matter how unfounded or frivolous. The taxpayer would have nothing to lose. All of the risk would be placed on the taxing entity, despite the fact that tax statutes carry a presumption of legal validity and tax officials presumptively act in good faith. This result would be disastrous.

The essential question in assessing the adequacy of pre-deprivation procedures is whether the procedure

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<sup>3</sup> Even assuming, which is so unlikely as to be unbelievable, that a state would institute criminal proceedings against a taxpayer asserting a good faith challenge to a tax statute, there can be no criminal sanctions for not paying a tax that is not yet due and payable. Petitioner appears to be arguing that the existence of any sanctions necessary to collect taxes from recalcitrant taxpayers makes the entire pre-deprivation procedure coercive, although there is no indication that any of these sanctions would be applied in a legitimate, good faith challenge to the validity of a tax assessment.

gives taxpayers a "fair" opportunity to contest the validity of a tax before payment and the "clear and certain" remedy of not having to pay a tax that is declared invalid. *McKesson*, 496 U.S. at 39.<sup>4</sup> A "meaningful opportunity" does not mean a totally risk-free procedure for challenging a tax assessment. Imposing penalties and interest on a taxpayer who fails to prevail on the merits of his claim is not the constitutional equivalent of a procedural bar against filing such a claim. The possibility of increased cost from having to pay an obligation later is simply an

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<sup>4</sup> *McKesson* states that due process requires (1) a meaningful opportunity to be heard and (2) the availability of a clear and certain remedy. 496 U.S. at 39. Petitioner misreads this statement. Petitioner does not argue that the remedy of being relieved of having to pay a tax declared unconstitutional was not clear and certain. Rather, Petitioner argues that the procedures provided are not clear and certain because they contain some risks or uncertainties. Brief for Petitioner at 17-26. The fact that a procedure contains some inherent risk should the applicant not prevail in his challenge or that an applicant must make decisions regarding which of several procedures to utilize cannot result in the procedures themselves not being meaningful. A procedure is meaningful under due process if it provides a fair opportunity to be heard. Georgia law provided Petitioner ample opportunities to be heard prior to payment of the tax. Petitioner further argues that because Georgia provided a "clear and certain" post-deprivation remedy under its refund statute, thus giving taxpayers the option to postpone a challenge until after payment, its entire remedial scheme was "unclear and uncertain." Brief for Petitioner at 27. This argument is contrived. That Petitioner was himself "unclear" or "uncertain" which procedure to choose cannot be blamed on any inadequacy in the procedures.



inherent risk of litigation. On the other hand, the assessment of penalties and interest is a necessary and altogether reasonable method for states to secure timely tax payments. A balancing of the competing interests under due process analysis must accommodate the states' vital interest in the payment and collection of tax revenues. *McKesson*, 496 U.S. at 37 n.19.

Moreover, to hold that the assessment of penalties and interest for the failure to timely pay a valid income tax constitutes "duress" would be contrary to this Court's established precedents. Essentially, duress is the payment of a tax under such coercion that the taxpayer in reality has no option but to pay the tax rather than challenge it. See *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 n.11 (1973) (duress consists of sanctions so substantial as to realistically give the taxpayer "no choice at all"). The Court has consistently found duress only when the taxpayer would risk imminent seizure of property or the termination or serious disruption of business operations. See *United States v. Mississippi Tax Comm'n*, 412 U.S. at 368 n.11 (sanctions for nonpayment included forcing taxpayer to give up an entire line of business); *Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17, 23 (1920) (choice between payment and loss of land); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912) (penalties plus cancellation of right to do business and loss of right to relief); *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 286 (1912) (taxpayer subject to serious, if not fatal, impairments to its contracts and injury to its business).

Nothing so Draconian faces Petitioner in this case. The possibility that a taxpayer who unsuccessfully challenges the imposition of an income tax may be subject to

penalty and interest cannot realistically be viewed as the type of coercion that leaves the taxpayer "no choice at all." On the other hand, a state has a vital interest in incorporating within its pre-deprivation procedures means to enforce the timely payment of taxes. In fact, if a state cannot include such measures within its system, it is the state that is left with "no choice at all" in developing a pre-deprivation procedure that satisfies due process.

Ironically, Petitioner in this case argues that Georgia law coerces taxpayers into paying their taxes before challenging them, yet admits that he was not coerced into paying his own taxes before bringing this challenge. Petitioner has refused to pay any state taxes on his retirement income for taxable year 1988, admits that he has been deprived of no property for this non-payment, and cannot deny that he has received and continues to receive extensive "process" through both the state and federal court systems.<sup>5</sup> See Brief for Petitioner at 5.

Thus, while Petitioner here presents his question as one of pre-deprivation process, his actual argument is that Georgia's pre-deprivation process is inadequate to provide him post-deprivation relief for voluntarily paid taxes.<sup>6</sup> This argument is convoluted. Obviously, the clear

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<sup>5</sup> This is true despite the fact that the taxes due in April 1989 were for taxable year 1988, prior to the *Davis* ruling, with only the payment date delayed until April 1989. See *American Trucking Ass'ns v. Smith*, 496 U.S. at 186-87 (tax liability depends on date of occurrence of taxed transaction, not date for remittance of tax).

<sup>6</sup> In fact, as is clear from Petitioner's Statement of the Case, Petitioner took no action to contest the validity of the tax prior

and certain remedy available through a pre-deprivation process is relief from having to pay an invalid tax in the first place. Once the taxpayer voluntarily pays the tax, he cannot rely on state pre-deprivation procedures for a post-payment remedy. And he should not be allowed to rely on the federal courts for relief not available under federal law or under state law.

**C. Due process does not require that state pre-deprivation procedures expressly include suits for injunctive relief.**

In *Harper* and *McKesson*, the Court offered two examples of adequate pre-deprivation process: "authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment"; or "allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." *Harper*, 113 S. Ct. at 2520, quoting *McKesson*, 496 U.S. at 36-37. While these remedies may indeed afford due process, due process also may be satisfied in other ways.<sup>7</sup> Requiring only those specific procedures would ignore the flexibility inherent in the concept of due process and would ignore the weight due

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to assessment or payment. See Brief for Petitioner at 2-9. The Statement details the procedures Petitioner followed *after Davis* and *after* the taxes were assessed, i.e., only post-deprivation procedures seeking refunds. Petitioner cannot properly assert that Georgia's pre-deprivation procedures were inadequate to provide him relief when he failed to pursue them *at the pre-deprivation stage*.

<sup>7</sup> In another extreme position, Amici NARFE, *et al.*, assert that the list of two provided in *McKesson* is exhaustive, whether the Court so intended or not. Brief for Amici NARFE, *et al.*, at 7.

the states' interest in collecting taxes and administering their tax systems.

While some states allow taxpayers to bring suits to enjoin taxes, the argument that allowing a taxpayer to bring such a suit is a requirement of adequate pre-deprivation relief misses the point.<sup>8</sup> The focus of the pre-deprivation inquiry is whether the taxpayers had a meaningful opportunity to challenge the validity of the tax before payment. Surely, an opportunity to challenge a tax is meaningful if through that procedure the taxpayer can receive full pre-deprivation relief from the payment of an unlawful tax. This opportunity may be provided in various ways, and a suit to enjoin the tax is not necessary for full pre-deprivation relief.

As discussed above, one way a taxpayer may receive full pre-deprivation relief is by a declaratory judgment action. A declaratory judgment by a court is a binding adjudication of the rights of the parties. Such a decision clearly prevents the state from collecting the tax, regardless of whether the state expressly allows suits to enjoin the collection of taxes.<sup>9</sup> If a taxpayer fails to take advantage of this available pre-deprivation procedure in a timely fashion and pays the tax without challenge, he

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<sup>8</sup> The general purpose of state anti-injunction statutes is to prohibit a taxpayer from waiting until taxes are delinquent and then filing a suit to enjoin the state from issuing a notice of deficiency or from taking steps to collect the delinquent taxes.

<sup>9</sup> For this reason Congress not only prohibits suits to enjoin the collection of federal taxes (26 U.S.C. § 7421(a)), but also excludes from the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, suits "with respect to Federal taxes." See *Bob Jones University v. Simon*, 416 U.S. 725, 732 n.7 (1974).



cannot then assert that due process also entitles him to post-deprivation remedial procedures. Whether the taxpayer is then entitled to post-deprivation relief is solely a matter of state law.

**D. Due process does not require that taxpayers be allowed to withhold payment of taxes pending state enforcement proceedings.**

The other pre-deprivation procedure suggested by the Court in *McKesson* and *Harper* is to allow a taxpayer to withhold payment of a tax and contest the validity of the tax as a defense in a state enforcement proceeding. This suggested procedure should not be interpreted to imply that, as a matter of pre-deprivation due process, a taxpayer may simply refuse to pay his taxes and wait for the state to bring a judicial enforcement or collection action, at which time the taxpayer may defend his refusal to pay by asserting the invalidity of the tax. Such a procedure shifts the burden from the taxpayer to challenge a tax statute in order to avoid payment to the state to justify its tax statutes before it may collect taxes. Traditional due process analysis does not require and does not support this result.

Placing this burden on the states distorts due process by giving excessive weight to the private interest of being able to challenge the validity of a tax prior to payment and by not balancing this interest against the governmental interest in establishing expeditious and reliable means to collect revenues. This beneficent grant to taxpayers also is in total conflict with the accepted principle

that state statutes carry a presumption of constitutionality. See *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). And, importantly, it ignores "the fiscal and administrative burdens" that such a procedural requirement would entail. *Mathews*, 424 U.S. at 335.

Requiring states to withhold their tax collections pending the result of a state judicial collection or enforcement proceeding would create fiscal and administrative burdens that would preclude most states from even contemplating such a system. Such a requirement could force states to create separate courts to hear tax claims, and the resulting delay in collecting revenues could well be fiscally impossible for many states.

In considering the adequacy of pre-deprivation procedures, this Court should consider the relative burdens alternate procedures would create. Surely, it is more unreasonable to burden states with the requirement to bring enforcement actions against any taxpayer who wishes to withhold payment, than it is to place the burden on the taxpayer to initiate a challenge to the validity of the tax before paying it.

Should a state choose to allow taxpayers to withhold payment of a tax and place the burden on the state to bring an enforcement action in court at which the taxpayer may assert the invalidity of the tax, a state is free to do so. Although such a procedure would satisfy due process, states should not as a constitutional matter be required to provide this procedure in lieu of other pre-deprivation remedies. The purpose of a pre-deprivation

remedy is to allow a taxpayer to challenge the validity of a tax before paying it. States may provide taxpayers various judicial or administrative procedures that permit this challenge before payment of the tax.<sup>10</sup> The focus of the inquiry is this: may the taxpayer receive relief from the obligation to pay the tax through the procedure provided. If so, due process has been satisfied.

### III. This Court Should Continue to Allow States Flexibility to Enact Tax Collection and Refund Systems that Satisfy the Minimum Demands of Federal Due Process.

Federal law clearly permits state interests to play a role in "shaping the contours of the relief" that a state affords to taxpayers illegally or erroneously taxed. See *McKesson*, 496 U.S. at 50. One state interest this Court expressly has recognized is "the Government's interest . . . in conserving scarce fiscal and administrative resources." *Mathews*, 424 U.S. at 348. Another, as the Court noted in *American Trucking Ass'ns v. Smith*, is the historic doctrine of federal-state comity:

While the relief provided by the State must be in accord with federal constitutional requirements, we have entrusted state courts with the initial duty of determining appropriate relief. . . . Our reasons for doing so have arisen from a perception based in considerations of federal-state comity. . . . In a case such as this, where a state court has addressed the refund issues, the same

<sup>10</sup> See, e.g., Ga. Code Ann. §§ 48-2-59 and 48-3-1 (1991), § 50-13-12 (1990).

comity-based perception that has dictated abstention in the first instance requires that we carefully disentangle issues of federal law from those of state law and refrain from deciding anything apart from questions of federal law directly presented to us. By these means we avoid interpreting state laws with which we are generally unfamiliar and deciding additional questions of federal law unnecessarily.

496 U.S. at 176-77. The majority in *American Trucking Ass'ns v. Smith* concluded that "[w]e are not, however, in a position to determine precisely the nature and extent of the relief to which petitioners are entitled for their . . . tax payments. That determination . . . lies with the state courts in the first instance." *Id.* at 200.

Most recently, in *Harper*, the Court held that

"a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." . . . [W]e leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia "is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements."

113 S. Ct. at 2519-20, quoting *McKesson*, 496 U.S. at 39-40, 51-52.

As discussed below, states have devised multiple systems of complex procedures to satisfy both federal due process requirements and their own need for certainty in fiscal planning.



**A. There is no federal requirement that each state provide the same remedial process.**

Because there is no one mandated means of providing due process and no requirement that each state provide taxpayers the same process, states enact their systems based on their specific needs and resources and on various policy decisions. The specific remedies created often are closely related to the procedures available to contest the taxes. For example, one state may require taxpayers to pay under protest and to pursue administrative relief to preserve their challenges, but may then make refunds mandatory when taxpayers prevail in those challenges. Another state may place few such procedural requirements on taxpayer challenges, but may limit the availability of refunds. One state may adopt a long statute of limitations in tax cases but may impose various procedural requirements. Another state may adopt a shorter statute of limitations but impose fewer procedural requirements. Moreover, each state's express statutory tax collection and refund procedures may be further limited or expanded by state court decisions interpreting those statutes.

The following summary illustrates some of the differences among states' current procedures for taxpayer challenges to tax assessments. Each of these listed procedures is only one component of the state's complete system.

1. Injunctive Relief. A number of states allow taxpayers to seek injunctions staying the

payment of contested taxes.<sup>11</sup> There are also a number of states, however, with statutes that specifically bar injunctive relief in most tax cases.<sup>12</sup>

2. Declaratory Judgment Action. Declaratory judgment actions are available to taxpayers in many states to challenge the validity of a tax.<sup>13</sup>

3. Administrative Appeal Process. A large number of states have established an administrative review process for taxpayers to protest the validity of taxes assessed.<sup>14</sup> Some of these administrative procedures require the taxpayer

<sup>11</sup> See, e.g., Ga. Code Ann. § 9-5-1 (1993); Kan. Stat. Ann. § 60-907 (1983); Miss. Code Ann. § 11-13-11 (1972); Mont. Code Ann. §§ 27-19-102, 27-19-103 (1993); Okla. Stat. Ann., tit. 12, § 1397 (1993). See also *Tully v. Griffin*, 429 U.S. 68, 76 (1976) (New York statutory and case law allows courts to award injunction in declaratory judgment actions challenging tax).

<sup>12</sup> See, e.g., Ariz. Rev. Stat. Ann. § 42-124(B)(1) (1991); Minn. Stat. Ann. § 289A.43 (West Supp. 1994); Va. Code Ann. § 58.1-1831 (1991).

<sup>13</sup> See, e.g., Ga. Code Ann. § 9-4-2 (1993); Kan. Stat. Ann. § 60-1701 (1983); Mont. Code Ann. §§ 27-8-101 through 27-8-206 (1993); N.Y. Civ. Prac. L. & R. § 3001 (West 1991); Okla. Stat. Ann. tit. 12, § 1651 (1993); Utah Code Ann. §§ 78-33-1 through 78-33-13 (1992); Va. Code Ann. § 8.01-184 (1992).

<sup>14</sup> See, e.g., Ariz. Rev. Stat. Ann. § 42-122 (1991) (exhaustion required); Ga. Code Ann. § 50-13-12 (1990); Kan. Stat. Ann. § 79-3226 (Supp. 1994) and § 74-2438 (1992) (exhaustion required); Minn. Stat. Ann. § 289A.65 (West 1992); Miss. Code Ann. § 27-7-71 (1991); Mont. Code Ann. § 15-1-211 (West Supp. 1994); Okla. Stat. Ann. tit. 68, §§ 207 and 221 (1992); Utah Code Ann. §§ 59-1-501 through 59-1-505 (1992); Va. Code Ann. § 58.1-1821 (1991); Wis. Stat. Ann. §§ 71.87 through 71.90 (West 1989).

to pay the tax before the administrative review, some require the taxpayer to post a bond, and still others allow the taxpayer to seek administrative review before paying the tax and without posting a bond. Some state statutes expressly prohibit their tax departments from taking any enforcement or collection actions while the administrative review is pending.<sup>15</sup>

4. Review by State Court. Taxpayers can, in most cases, obtain review by a state court of a contested tax assessment,<sup>16</sup> although some states require exhaustion of administrative remedies as a prerequisite. A number of states, including Arizona, Indiana, Maryland, Minnesota and Oregon, have established special state tax courts.

5. Refund Procedures. States also vary widely in their statutory procedures for refunds. In some states, no refund is available unless the tax was paid under protest or unless an amended return or request for refund is filed within a specified time period. Some states impose no preliminary restrictions on access to their refund procedure but impose other limitations on the award of refunds. In other states,

<sup>15</sup> See, e.g., Va. Code Ann §§ 58.1-1821, 58.1-1822 (1991).

<sup>16</sup> See, e.g., Ariz. Rev. Stat. § 42-124(B)(2) (1991); Ark. Const. art. 16, § 13 (1874) (illegal exaction action); Ga. Code Ann. §§ 48-2-59 and 48-3-1 (1991); Kan. Stat. Ann. § 74-2426(c)(3) (1992); Minn. Stat. Ann. § 271.10 (West 1989); Miss. Code Ann. § 27-7-73 (1991); N.Y. Tax §§ 681 and 690 (West 1987) and N.Y. Civ. Prac. L. & R. § 3001 (West 1991) and Art. 78 (West 1991); Okla. Stat. Ann. tit. 68, § 225 (1992); Utah Code Ann. §§ 59-1-601 through 59-1-608 (1992); Va. Code Ann. § 58.1-1825 (1991); Wis. Stat. Ann. §§ 71.87 through 71.90 (West 1989).

statutes mandate payment of a refund if it is determined that the tax was erroneously or illegally exacted.<sup>17</sup>

States have adopted combinations of these various procedures in an effort to give their taxpayers adequate due process, while at the same time preserving the states' significant interests in certainty and predictability of their tax revenues, in ensuring compliance with state tax laws, and in preventing frivolous claims.

**B. The Court should defer to the states' authority to establish their own systems and should not dictate that each state's system include or exclude specific components to satisfy federal due process.**

In view of the great diversity and complexity of individual states' established procedures for challenging state taxes, this Court should, consistent with its prior holdings in *McKesson, American Trucking Ass'ns v. Smith* and *Harper*, continue to allow each state the freedom to craft its own pre- and post-deprivation remedies within the broad parameters of federal due process. Such a holding would not deny due process to taxpayers, but would allow the states the flexibility to work within existing statutory frameworks and conserve limited administrative resources without imposing rigid procedural requirements.

<sup>17</sup> See, e.g., N.M. Stat. Ann. § 7-1-26 (Michie 1993) (refunds mandatory); Va. Code Ann. § 58.1-1826 (1991) (court granted discretion to determine remedy).



A ruling in this case imposing specific procedural requirements would create an unmanageable administrative burden, engender confusion and uncertainty, call into question each state's existing procedures, and possibly force states to hold special legislative sessions to modify their current statutory procedures. As this Court has consistently held, as long as a state's procedures meet the minimum requirements of federal due process, it does not matter which specific procedures the state's legislature has chosen.

**IV. Federal Law Does Not Necessarily Require States that Do Not Provide Adequate Pre-Deprivation Procedures to Provide Refunds of Illegally Assessed Taxes.**

Petitioner, and the amici supporting Petitioner, refuse to hear this Court's repeated reminders to tax litigants that state law ultimately may play the determinative role in resolving questions of remedy.<sup>18</sup> Rather, Petitioner attempts "to buttress [his] claim" for refunds under state law by reference to statements in *McKesson* regarding

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<sup>18</sup> This refusal to listen is evident in the briefs filed in this case. In his Petition for a Writ of Certiorari, Petitioner presented two questions, the first relating to the Georgia Supreme Court pre-deprivation procedures ruling and the second relating to the Georgia Supreme Court post-deprivation refund ruling. The Court granted certiorari on the first question only. Although Amicus Committee of State Taxation ("COST") is the only one to admit it (Brief of Amicus COST at 9), Petitioner, Amicus Tax Executives Institute ("TEI"), and Amicus COST present to this Court arguments relating solely to the second question. See Brief of Petitioner at 26-29, Brief of Amicus TEI at 3-23, Brief of Amicus COST at 9-12.

federal remedial law. *Beam*, 111 S. Ct. at 2448. The Court rejected a similar attempt by the petitioner in *Beam*, reiterating its "repeated[ ] observ[ation]" that "federal 'issues of remedy . . . may well be intertwined with or their consideration obviated by, issues of state law.'" *Id.*, quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984).

Petitioner continues to distort the holdings of this Court by arguing that, 'cause Georgia's pre-deprivation procedures are inadequate, federal law requires Georgia to refund the taxes illegally assessed. This argument is wrong. Federal law does not "obviate" state remedial law.<sup>19</sup> A ruling by this Court that a state's pre-deprivation procedures fail to satisfy due process does not mean that, under federal law, the state must, therefore, refund all illegally assessed taxes, regardless of the circumstances present in each particular case.

It is clear that, as with a pre-deprivation remedy, a state may place various procedural requirements on taxpayers seeking a post-deprivation remedy. See *Beam*, 111 S. Ct. at 2448 (noting that "[n]othing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law"); *McKesson*, 496 U.S. at 45 (states may enact procedural pre-conditions to obtaining refunds, such as requiring payment under protest). And, even if a taxpayer complies with such preconditions,

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<sup>19</sup> This Court should disregard Amicus TEI's broad, unsupported, accusatory imputation of bad faith to all state governments as well as its suggestion that the time has come for the Court to usurp the states' power to fashion remedies. See Brief for Amicus TEI at 10-11, 16-21.

federal due process does not mandate retroactive remedial relief in every case. See *Harper*, 113 S. Ct. at 2537 (no "constitutional absolute" that prohibits states from confining a taxpayer "deprived a predeprivation remedy" to prospective relief) (O'Connor, J., dissenting); *Beam*, 111 S. Ct. at 2448 (litigants may assert and courts may consider equitable and reliance interests of parties in determining remedial issues); *American Trucking Ass'ns v. Smith*, 496 U.S. at 215 (equitable considerations may be taken into account in determining what relief is appropriate in any given case) (Stevens, J., dissenting); *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (equitable considerations are relevant in determining relief that is appropriate in any given case) (Harlan, J., concurring).<sup>20</sup> Even if the Court concludes here that Georgia's pre-deprivation process is inadequate to satisfy federal due process, whether either federal law or state law mandates remedial relief in this case, and what form any remedial relief might take are issues for another day. Those issues are not presented in this case and will not be resolved by the decision in this case.



<sup>20</sup> The facts in this case are clearly distinguishable from those in *McKesson*, in which the Court held that the state knowingly imposed an unconstitutional tax. Because there was no basis for the state's good faith reliance on the validity of its statute, the Court found the state's equitable arguments insufficiently "weighty" to support a decision to withhold the remedy. 496 U.S. at 45.

## CONCLUSION

For the reasons stated, this Court should affirm the holding of the Georgia Supreme Court that Georgia's pre-deprivation procedures afforded Petitioner an opportunity adequate under the Due Process Clause to challenge the contested taxes before paying them.

Respectfully submitted,

JAMES S. GILMORE, III  
Attorney General of Virginia

DAVID E. ANDERSON  
Chief Deputy Attorney General

CATHERINE C. HAMMOND  
Deputy Attorney General

ROGER L. CHAFFE  
GREGORY E. LUCYK\*  
Senior Assistant Attorneys General

CYNTHIA W. COMER  
BARBARA H. VANN  
Assistant Attorneys General

101 North Eighth Street  
Richmond, Virginia 23219  
(804) 786-0082

\*Counsel of Record for Amici Curiae



MAY 25 1994

IN THE  
**Supreme Court of the United States** DE CLERK

OCTOBER TERM, 1993

CHARLES J. REICH,  
v. *Petitioner,*

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the  
Supreme Court of Georgia

BRIEF OF THE  
NATIONAL GOVERNORS' ASSOCIATION,  
COUNCIL OF STATE GOVERNMENTS,  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
NATIONAL ASSOCIATION OF COUNTIES,  
NATIONAL LEAGUE OF CITIES,  
INTERNATIONAL CITY/COUNTY  
MANAGEMENT ASSOCIATION,  
AND U.S. CONFERENCE OF MAYORS,  
JOINED BY THE MULTISTATE TAX COMMISSION,  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CHARLES ROTHFELD  
MAYER, BROWN & PLATT  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 778-0616

RICHARD RUDA \*  
Chief Counsel  
STATE AND LOCAL  
LEGAL CENTER  
444 North Capitol St., N.W.  
Suite 345  
Washington, D.C. 20001  
(202) 434-4850

\* *Counsel of Record for the  
Amici Curiae*

### QUESTION PRESENTED

Whether this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), compels respondents to pay tax refunds in the circumstances of this case.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

No. 93-908

CHARLES J. REICH,  
v. *Petitioner,*

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the  
Supreme Court of Georgia

BRIEF OF THE  
NATIONAL GOVERNORS' ASSOCIATION,  
COUNCIL OF STATE GOVERNMENTS,  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
NATIONAL ASSOCIATION OF COUNTIES,  
NATIONAL LEAGUE OF CITIES,  
INTERNATIONAL CITY/COUNTY  
MANAGEMENT ASSOCIATION,  
AND U.S. CONFERENCE OF MAYORS,  
JOINED BY THE MULTISTATE TAX COMMISSION,  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

*Amici* National Governors' Association, Council of State Governments, National Conference of State Legislatures, National Association of Counties, National League of Cities, International City/County Management Association, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal gov-

ernments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission, the official administrative agency of the Multistate Tax Compact, has a vital interest in disputes that may affect the administration of state tax systems.

This case presents an issue of enormous and continuing importance to *amici*: whether, and in what circumstances, States may be required to refund taxes collected pursuant to statutes that have been held unconstitutional. A stable and predictable source of revenue is essential to the operation of state and local governments. Yet as this Court has often noted, its jurisprudence interpreting the intergovernmental tax immunity doctrine, the Commerce Clause, and other provisions limiting state and local taxing authority, is at times confusing and unpredictable. It thus is inevitable that taxing schemes occasionally will be held to run afoul of the Constitution. If refunds for these violations are too readily available, state and local governments will face not only revenue shortfalls but also unexpected and potentially ruinous liability. At the same time, the prospect of disruptive refund liability will discourage States and local governments from tapping constitutionally permissible sources of funds. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.<sup>1</sup>

#### SUMMARY OF ARGUMENT

Petitioner's refund claim cannot prevail for three independent reasons. *First*, although petitioner entirely skips over the issue, we think it plain that principles of sovereign immunity preclude suits for money damages brought in state court against unconsenting States. The Court in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), expressly found it unnecessary to address this issue because the State in that case

<sup>1</sup> The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to this Court's Rule 37.3.

had waived its immunity. But Georgia plainly has not. In such circumstances, this Court *never* has suggested that an action for money damages may be implied directly from the Constitution. Indeed, it is implicit in *McKesson* itself that the Constitution does not create an absolute entitlement (and a federal cause of action) for the recovery of wrongfully collected taxes that overrides state sovereign immunity; the Court indicated in *McKesson* that the availability of refunds may be limited by state-law restrictions such as payment under protest requirements and statutes of limitations—restrictions that have force because they are aspects of the State's waiver of sovereign immunity.

*Second*, even if petitioner has a right to proceed with his refund action, he is wrong in arguing that a taxpayer pays under duress whenever there is the *possibility* that the State may compel the payment of taxes or provisions of state law encourage prompt payment. In fact, it has long been settled that duress is present only when a taxpayer pays to avoid the *immediate* imposition of a significant sanction. Petitioner also is incorrect in his contention that Georgia's pre-deprivation remedies are constitutionally inadequate because their availability was not clearly established at the time that he paid his tax; this Court has indicated that taxpayers must pursue pre-deprivation remedies that are not squarely foreclosed by state law. In any event, it is plain from the record here that petitioner failed to invoke pre-deprivation remedies, not because he was unaware of their existence, but because he believed that Georgia's tax was constitutional.

*Third*, even if the Court concludes that petitioner's action may proceed and that Georgia did not offer constitutionally adequate pre-deprivation process, the award of a refund is not a foregone conclusion. *McKesson* expressly left open the possibility that courts retain some equitable discretion in the formulation of remedies for due process violations. And here, the unfairness to the State and its citizens of requiring the payment of refunds is manifest.



The decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), which led to the invalidation of Georgia's tax, could not have been anticipated; requiring refunds therefore would unreasonably penalize the State and would, for the future, discourage States from exploring new tax policies.

### ARGUMENT

To resolve this case, the Court will have to expand on the principles set out in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). There, the Court held that "if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *Id.* at 22. See *id.* at 31. The Court regarded this holding as an application of ordinary concepts of procedural due process, explaining that, "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause" (*id.* at 36-37 (footnote omitted)); the Court regarded meaningful relief (in the form either of a post-deprivation remedy or of an opportunity to preclude collection in the first place) as a necessary element of the State's procedure. See *id.* at 32.

The Court also explained that a constitutionally adequate regime may involve "a form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State." 496 U.S. at 36-37. The Court added:

[I]f a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure.

*Id.* at 38 n.21 (citation omitted). The Court repeated this conclusion, without elaboration, in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2519-20 (1993). See also *Associated Industries v. Lohman*, No. 93-397 (U.S. May 23, 1994), slip op. 15.

While *McKesson* provides the backdrop against which this case must be decided, it leaves unanswered the questions that are dispositive here. The decision in *McKesson* simply does not speak to the question whether a State that has not waived its sovereign immunity may be held liable in money damages for use of an unconstitutional system of tax administration. The Court did not describe in any detail the "duress" that would make a system of pre-deprivation process inadequate. And the *McKesson* Court plainly seems to have contemplated that, even in cases where liability otherwise might be constitutionally mandated, equitable considerations may militate against the award of monetary relief. A close consideration of each of these issues makes clear that petitioner's refund claim should not prevail.

### I. GEORGIA'S SOVEREIGN IMMUNITY PRECLUDES AN AWARD OF MONEY DAMAGES AGAINST THE STATE

1. Petitioner devotes virtually all of his brief to the argument that the Georgia system does not comport with the requirements of due process. In doing so, however, he entirely skips over a crucial threshold issue: whether

he has a right even to seek monetary relief from the State. In our view, petitioner's action for money damages, brought in state court against an unconsenting State, is precluded by principles of sovereign immunity.

While the ground advanced by petitioner in seeking a refund is the inconsistency of the challenged tax with the dictates of the intergovernmental tax immunity doctrine, his cause of action did not spring full-blown from the federal Constitution. Instead, petitioner initiated this suit in state court under a state cause of action. Yet the Georgia Supreme Court has held dispositively, as a matter of state law, that the state refund statute under which petitioner sued "does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid." Pet. App. 8D. The court also made clear that "in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last." *Ibid.* Petitioner thus himself acknowledges, albeit elliptically, that Georgia law does not provide him with a cause of action. See Pet. Br. 29-30. And because the refund statute is not applicable, the State has not waived its sovereign immunity from suit. See *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972); *Ingalls Iron Works Co. v. Blackmon*, 133 Ga. App. 164, 210 S.E.2d 377 (1974).<sup>2</sup>

Rather than invoke a state-law remedy, petitioner appears to believe that *McKesson* meant to create, and that he may proceed under, a federal refund action that is

<sup>2</sup> The court below evidently did not rely on this point in dismissing petitioner's refund action because it believed "that our duty on remand [from this Court] is to determine whether Georgia law provided a predeprivation remedy to Reich sufficient to satisfy the requirements of federal due process as set out in *Harper* and *McKesson*." Pet. App. 3A-4A.

grounded directly on the Fourteenth Amendment and that overrides state sovereign immunity. *McKesson*, however, recognized no such federal right of action. The taxpayer in *McKesson* proceeded under a state cause of action (see 496 U.S. at 23-24), a point confirmed by the Court's explicit and repeated recognition that state procedural limits on refund suits (such as payment under protest requirements or statutes of limitations) may apply to bar a refund. See *id.* at 24-25 n.4, 45. And because the applicable refund statute waived the State's sovereign immunity in *McKesson*, the Court expressly found it unnecessary to determine whether a refund action could proceed absent such a waiver. *Id.* at 49 n.34.<sup>3</sup>

Against this background, it is important to distinguish two issues that are implicated by petitioner's argument. The first involves the requirements of procedural due process. As to this, *McKesson* concededly held that States must provide either a pre- or post-deprivation method of challenging wrongful taxation; when a State that has waived sovereign immunity and opened its courts to refund claims provides no pre-deprivation process, application of this principle could require the State to offer post-deprivation relief. The second and distinct issue is whether a State that has violated the due process principle recognized in *McKesson* and has not waived its sovereign immunity may be sued for money damages. That is a point to which *McKesson* expressly does not speak.

2. On that question, we think it plain that States may assert their sovereign immunity in their own courts against claims for money damages, even if the claims are grounded on the federal Constitution. Since the foundation of the Union, it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its

<sup>3</sup> The taxpayers in *Harper* also proceeded under a state cause of action that waived the State's sovereign immunity and, indeed, specifically extended the statute of limitations for claims grounded on *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). See *Harper*, 113 S. Ct. at 2514.



own courts without its consent.” *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989), quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). See *Nevada v. Hall*, 440 U.S. 410, 420 (1979); *id.* at 431 (Blackmun, J., dissenting). While the specific question whether that immunity applies to federal claims advanced against the States in state court has been infrequently litigated, on those occasions when the Court has reached the issue it consistently has indicated that “[w]ithout [a State’s] consent it cannot be sued in any court, by any person, for any cause of action whatever.” *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911). See *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929);<sup>4</sup> *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Railroad Co. v. Tennessee*, 101 U.S. (11 Otto) 337, 339 (1880); *Beers*, 61 U.S. (20 How.) at 529.

Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution’s ratification (see *Welch v. Texas Dept. of Highways & Public Transportation*, 483 U.S. 468, 480, 484 (1987) (plurality opinion); *id.* at 504-507, 511-13 (Brennan, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 263-80 (1985) (Brennan, J., dissenting)), we are aware of no suggestion during those debates that state courts were obligated by the Constitution to entertain claims against States for money damages. See generally *ibid.* And that is hardly surprising; it was and is a fundamental tenet of sovereign immunity that, wherever else it may be haled into court,

<sup>4</sup> In *Conway*, the Court enjoined the collection of a Louisiana tax asserted to violate the Equal Protection Clause because state law would not allow for a refund if the tax ultimately were held to be unconstitutional, even where the taxpayer paid “under both protest and compulsion.” 279 U.S. at 815. The Court’s conclusion that this absence of a state remedy posed the risk of irreparable injury to the taxpayer (*ibid.*) certainly suggests that the Constitution would not of its own force mandate payment of a refund absent a waiver of sovereign immunity.

“no sovereign may be sued in its own courts without its consent.” *Hall*, 440 U.S. at 416.

This view is confirmed by the modern understanding of the Eleventh Amendment, which of course bars federal courts from entertaining claims for money damages against the States (including claims for the refund of unconstitutional taxes). See *Kennecott Copper Co. v. State Tax Comm’n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944). See generally *Papasan v. Allain*, 478 U.S. 265, 278 (1986); *Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974). While the Court has debated the meaning of the Amendment at length in recent years, in its most current analysis at least five Justices accepted the rule of *Hans v. Louisiana*, 134 U.S. 1 (1890), which rests on the proposition that suits against unconsenting States were “unknown to the law” at the time of the Constitution’s ratification (*id.* at 15). These Justices thus recognized that the Eleventh Amendment applied to Article III of the Constitution (and to the federal courts) “the fundamental principle of sovereign immunity” that prevailed at that time. *Welch*, 483 U.S. at 472 (plurality opinion), quoting *Pennhurst State School & Hospital v. Halderman*, 473 U.S. 89, 98 (1984). See *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Atascadero*, 473 U.S. at 238.<sup>5</sup>

This view of state sovereign immunity is fully consistent with the Court’s most recent close consideration of the Eleventh Amendment, *Pennsylvania v. Union Gas*

<sup>5</sup> See *Dellmuth v. Muth*, 491 U.S. 223, 229 n.2 (1989) (declining to overrule *Hans*); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 57 n.8 (1989) (opinion of White, J.) (stating that *Hans* should not be overruled); *id.* at 33-35 (opinion of Scalia, J.) (stating that *Hans* should not be overruled). Justice White joined the plurality opinion in *Welch*, while the Chief Justice and Justices O’Connor, Scalia, and Kennedy seemingly have endorsed that opinion. See *Union Gas*, 491 U.S. at 30-35 (opinion of Scalia, J.). The *Welch* plurality opinion therefore appears to express the views of a majority of the Court.

*Co.*, 491 U.S. 1 (1989), in which a splintered Court held that Congress may override the States' Eleventh Amendment immunity when exercising its power under the Commerce Clause. The plurality reasoned that, "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action." *Id.* at 22 (plurality opinion). But as this language itself indicates, the four Justices in the plurality accepted the existence of state sovereign immunity even in federal court in the absence of congressional action. See, e.g., *id.* at 19 (emphasis added) ("Congress has the authority to *override* States' immunity when legislating pursuant to the Commerce Clause"). The four Justices in dissent, meanwhile, read the Eleventh Amendment as reflecting "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted." *Id.* at 31-32 (opinion of Scalia, J.). Needless to say, neither these opinions, nor Justice White's separate opinion, suggested that state courts need entertain actions against States that cannot be brought in federal court.<sup>6</sup>

<sup>6</sup> One of this Court's decisions, *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908), occasionally is cited for the proposition that a State may not assert its sovereign immunity in its own courts against federal constitutional claims. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1095-1096 (1983). But *Crain*—which predated many of the cases we cite above—is slender authority for such a profound proposition, "for more reasons than just the age and moderate obscurity of the case." *Id.* at 1096. *Crain* was an action brought in state court against a state official seeking injunctive relief for an asserted violation of the Commerce Clause. This Court rejected the State's argument that its courts lacked jurisdiction to hear the claim, reasoning that the Eleventh Amendment would make injunctive relief unavailable in federal court and that there must be some means of enforcing the Constitution in some court. 209 U.S. at 226-27. Because the Court went on to reject the Commerce Clause claim on the merits, the jurisdictional issue might not have been

By ratifying the Constitution, the States thus did not consent (in the absence of congressional action) to the assertion against them of constitutional claims in federal court. This being so, it is difficult to imagine why, by the same ratification, they should be understood to have taken the unlikelier step of irrevocably waiving the fundamental protection of sovereign immunity against constitutional claims in their own courts. That the States did not take such a step has been the clear understanding of the Court, which has emphasized that States *may* supplement whatever remedies for constitutional violations are available in federal court "by waiving their immunity from suit in state court on state-law claims." *Welch*, 483 U.S. at 488 (plurality opinion) (footnote omitted). See *Will*, 491 U.S. at 85 (Brennan, J., dissenting). And this conclusion is only logical. The United States, after all, is bound by the Constitution to the same extent as are the States, yet it is not amenable to suit on constitutional claims in its own courts absent a waiver of immunity. Cf. *Union Gas*, 491 U.S. at 34 (opinion of Scalia, J.).

3. As this reasoning makes clear, when a State declines to create a cause of action to remedy the collection of unconstitutional taxes, a federal remedy (either in federal or in state court) is not available directly under the Constitution on the theory of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). For sovereign im-

carefully analyzed. In any event, the suit was not one for monetary relief. And the proposition upon which the Court grounded its jurisdictional discussion—that the Eleventh Amendment would bar a federal court from entertaining a claim against a state official for prospective relief—plainly no longer is valid (even if it was at the time *Crain* was decided). Indeed, Justice Harlan concurred separately, maintaining that the existence of jurisdiction "certainly is a state, not a Federal question. Surely, [the State] has the right to say of what class of suits its own courts may take cognizance." *Id.* at 233 (Harlan, J., concurring). Not surprisingly, "[n]o modern case has held that state courts have an obligation to hear claims barred from the federal courts by the eleventh amendment." Fletcher, *supra*, 35 Stan. L. Rev. at 1096.



munity (and Eleventh Amendment) purposes, the distinction between prospective injunctive and retrospective monetary relief is fundamental. Whether or not a *Bivens* action is available in federal court against state officials for prospective relief under the Constitution, the Eleventh Amendment—a textual limitation on suit in federal court that trumps the *Bivens* remedy—would bar a federal court from awarding money damages. The availability of an action in state court under a *Bivens* theory, meanwhile, is a matter of state law, and state sovereign immunity rules would be fully applicable in such an action.<sup>7</sup>

Indeed, it is implicit in *McKesson* itself that the Constitution does not create an absolute entitlement (and a federal cause of action) for the recovery of wrongfully collected taxes that overrides state sovereign immunity. If there were such an entitlement, state-created restrictions on state-law refund actions, such as payment under protest rules, statutes of limitations, and standing restrictions—which have force because they are aspects of the State's waiver of its sovereign immunity (see, e.g., *Ingalls Iron Works*, 133 Ga. App. at 165, 210 S.E.2d at 378)—could not be applied to limit a taxpayer's recovery. But *McKesson* (as well as the decisions upon which it relied) expressly held that not to be so, indicating that States may “provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint \* \* \* [or may] enforce relatively short statutes of limitations applicable to such actions.” 496 U.S. at 45 (footnote omitted). See also *Ward v. Love County Board of Comm'rs*, 253 U.S.

<sup>7</sup> The Court has explained that it is “[t]he federal courts’ statutory jurisdiction to decide federal questions” under 28 U.S.C. § 1331 that “confers adequate power to award damages to the victim of a constitutional violation” on a *Bivens* theory. *Bush v. Lucas*, 462 U.S. 367, 378 (1983). See *id.* at 374; *Bivens*, 403 U.S. at 395-96; *Bell v. Hood*, 327 U.S. 678, 684 (1946). Whether the state statutes creating the jurisdiction of state courts confer similar power on those courts is a matter for the States.

17, 25 (1920) (refund may be barred if there was “any valid local [limitations] law in force when the claim was filed”). And it can hardly be the case that a State that has created a refund action may hedge it about with limitations, but that state liability is *unlimited* whenever (as in this case) the State has not created an applicable refund action at all.

In sum, the Georgia system would, under *McKesson*, violate the Due Process Clause if it did not provide adequate pre- or post-deprivation process, and a taxpayer could obtain injunctive relief to bring the system into conformity with such constitutional requirements. But nothing, either in *McKesson* or in the Court's more general jurisprudence of remedies, would make monetary relief available against an unconsenting State. To the contrary, while it may be that full compensation would be available for every wrong “[i]n the best of all possible worlds” (*Parratt v. Taylor*, 451 U.S. 527, 531 (1981)), the Constitution never has been understood to guarantee monetary relief as a remedy for all constitutional violations.<sup>8</sup>

From its inception, our system has recognized sovereign and official immunities that may make it impossible for injured parties to obtain money damages. “Modern doctrines, beyond any peradventure, depart decisively from the notion that the Constitution requires effective remedies for all victims of constitutional violations. Sovereign

<sup>8</sup> It may be that the only exception to this principle involves claims under the Just Compensation Clause, which is uniquely self-executing and secures a right to “compensation in the event of \* \* \* a taking” (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original)) that may overcome even the sovereign immunity of the United States. Cf. *Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1986). Indeed, the presence of such language in the Fifth Amendment—and in that Amendment alone—suggests that other provisions of the Constitution were *not* designed to make monetary relief available of their own force.

immunity remains undiminished as a constitutional concept." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1784 (1991) (footnotes omitted). See *id.* at 1781. The United States and (as we have explained) the individual States always have been permitted to assert sovereign immunity as a defense to claims for retrospective monetary relief, whether or not those claims were grounded on the Constitution. See generally *United States v. Mitchell*, 445 U.S. 535 (1980); *Sherwood v. United States*, 312 U.S. 584 (1941); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821). And this Court itself has created the extensive series of official immunities that sometimes bar the award of money damages against government officials for constitutional violations. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978). See also *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367, 372-73 & n.9 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983). A holding that the Constitution makes money damages available against States in the tax refund setting would be an unprecedented and wholly unwarranted departure from this Court's consistent past practice. Such a holding, moreover, would make no logical sense: it is impossible to understand how it is that immunity doctrines may bar any recovery for deprivations of liberty or even life (see, e.g., *Stanley*, 483 U.S. at 683-84) but may not come into play to preclude a recovery for a simple procedural due process violation leading to the deprivation of property.

4. In addition, even if sovereign immunity did not wholly preclude this Court from creating a damages action against unconsenting States, compelling prudential considerations would militate against such a course. If sovereign immunity is not regarded as an absolute bar to the creation of such a remedy, the policies that underlie

the doctrine nevertheless retain constitutional stature; in a case where the state courts find money damages unavailable, those policies should make any federal court, including this one, reluctant to take the unprecedented step of creating a monetary remedy against a State. That is particularly so when Congress chose not to make the States liable for money damages in enacting the principal vehicle for the enforcement of federal constitutional rights, 42 U.S.C. § 1983. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

Moreover, the nature of the federal system does not require judicial creation of a monetary remedy: as the Court has recognized, "the availability of prospective relief of the sort awarded in *Ex Parte Young*[, 209 U.S. 123 (1908),]" suffices to "give[] life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985). At the same time, institutional considerations suggest that the Court should hesitate before constitutionalizing the rules governing money damages—a course that would require the Court to assess the validity of every state remedial rule and that would transform every denial of a federally based action for a tax refund into a federal claim that could be brought to this Court. Some of that danger is visible in this case, where petitioner asks the Court to apply a four-year statute of limitations, rather than the three-year period normally applicable to tax refund claims in Georgia. See Pet. Br. 30.

It may be added that failure to create a damages remedy does not give States free reign to run roughshod over constitutional rights. Either state or federal courts would stand ready to provide declaratory or injunctive relief to terminate constitutional violations.<sup>9</sup> See *Will*, 491 U.S.

<sup>9</sup> While the Tax Injunction Act, 28 U.S.C. § 1341, ordinarily bars federal courts from enjoining the collection of state taxes, that prohibition does not apply when the state courts do not provide a "plain, speedy and efficient" method of challenging unconstitutional taxation.



at 58 & n.10; *Welch*, 483 U.S. at 488; *Papasan*, 478 U.S. at 276-77. Indeed, in the Eleventh Amendment setting the Court has concluded that the line between prospective and retrospective relief is the appropriate one to use in reconciling competing constitutional concerns, explaining that prospective relief is available in

cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as [in] cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."

*Papasan*, 478 U.S. at 277-78, quoting *Green*, 474 U.S. at 68.

Perhaps most fundamentally, the creation of remedies for the enforcement of the Fourteenth Amendment is textually committed to Congress by the Constitution. Congress's enforcement powers under the Fourteenth Amendment (and, the Court held in *Union Gas*, under the Commerce Clause) include the authority to create actions against the States for money damages. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Union Gas*, 491 U.S. at 19-22 (plurality opinion). The creation of remedies for fundamentally unfair activity on the part of the States is therefore appropriately left to congressional action. This Court accordingly should hold that petitioner's request for money damages is precluded by principles of sovereign immunity or, alternatively, should direct the Georgia Supreme Court to consider the issue on remand.

## II. GEORGIA PROVIDES ADEQUATE PRE-DEPRIVATION REMEDIES

If the Court nevertheless concludes that petitioner may proceed with his claim, it should hold that the Georgia system accords with the requirements of due process because it provides meaningful pre-deprivation remedies. In arguing to the contrary, petitioner contends both that Georgia compels taxpayers to pay prior to bringing a challenge (Br. 11-17), and that the State does not, in fact, provide any pre-deprivation method for contesting the legality of a tax (Br. 17-26). These arguments are without merit. Because respondents in their brief comprehensively address the particulars of Georgia law, we focus here on the constitutional standards that govern petitioner's claim.

### A. The Georgia System Does Not Place Taxpayers Under Duress To Pay Prior To Challenging A Tax

In *McKesson*, the Court held that post-deprivation relief must be provided when "a State penalizes taxpayers for failure to remit their taxes in timely fashion" (496 U.S. at 22) or "places a taxpayer under duress promptly to pay a tax when due." *Id.* at 31. The Court explained that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." *Id.* at 38 n.21. The Court cited for this proposition *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 (1973); *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 23 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912); and *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286 (1912). See also *Harper*, 113 S. Ct. at 2519-20 n.10. Petitioner evidently is of the view that "duress" in this sense is present whenever there is the possibility that the State may compel payment or whenever provisions of state

law encourage the prompt payment of taxes. See Pet. Br. 10. This contention, however, is plainly wrong.

1. In fact, it has long been settled that duress is present only when a taxpayer pays to avoid the *immediate* imposition of a significant sanction. Well over a century ago, Justice Field, writing for the Court, set out the controlling standard:

To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, \* \* \* there must be some *actual or threatened* exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of *immediate* relief than by making the payment. \* \* \* [T]he doctrine established by the authorities is, that "a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid."

*Radich v. Hutchins*, 95 U.S. (5 Otto) 210, 213 (1877) (emphasis added) (citation omitted).

The Court expanded upon this analysis the following year, in *Railroad Co. v. Comm'rs*, 98 U.S. (8 Otto) 541, 543-44 (1878) (citation omitted), stating:

"Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefore, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."

The Court accordingly held that the "real question" in such a case is "whether there was \* \* \* an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion." *Id.* at 544. The Court found no such necessity where the

county treasurer held a warrant authorizing the seizure of the taxpayer's property but had not yet attempted to serve it, had not made a personal demand for the taxes, "and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him." *Id.* at 545.

Similarly, in *United States v. New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), a taxpayer brought a refund action after paying a tax in circumstances where payment was a prerequisite for the release of its ships from port; failure to pay was a misdemeanor punishable by fine. See *id.* at 493-494. But citing to *Railroad Co.*, the Court found no "imminence" in the prospect of punishment and, accordingly, no duress. *Id.* at 494. The Court also deemed it significant that the taxpayer failed to tell collection authorities at the time of payment that he "was acting under the restraint of the law and yielding only to enable his ships to depart to their destinations," (*ibid.*), although the Court added that "'even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed.'" *Id.* at 492 (citation omitted). Accord *Chesebrough v. United States*, 192 U.S. 253, 259-60 (1904); *Little v. Bowers*, 134 U.S. 547, 555-56 (1890). There is no reason to doubt that these decisions, three of which were cited with approval in *Mississippi Tax Comm'n*, 412 U.S. at 368 n.11 (citing *New York & Cuba Mail Steamship Co.*, *Little*, and *Railroad Co.*) remain good law today.

2. The validity of this principle is made clear by considering the cases, including *McKesson*, in which the Court found duress to be present; all involved penalties that were immediate and draconian. In *McKesson* itself, the State was able to levy on the taxpayer's goods, to impose a penalty of 50% along with interest of 1% per month, and—most significantly—to revoke (or decline to



renew) a liquor distributor's license to do business in Florida, a step that evidently could be taken without giving the taxpayer a pre-deprivation opportunity to have the constitutional issue resolved. See 496 U.S. at 38 n.20.<sup>10</sup> The decisions cited in *McKesson* involved similar sanctions.<sup>11</sup>

The Court in *McKesson* also quoted *O'Connor* to the effect "that a taxpayer pays 'under duress' when he proffers a timely payment merely to avoid a 'serious disadvantage in the assertion of his legal . . . rights' should he withhold payment and await a state enforcement proceeding in which he could challenge the tax scheme's validity 'by defence in the suit.'" 496 U.S. at 38 n.21, quoting 223 U.S. at 286. This observation has no bearing here. The *O'Connor* Court indicated that the sort of "serious disadvantage" it had in mind was that faced by the plaintiff in *Ex Parte Young*, 209 U.S. 123 (1908), where violation of the challenged state law was a felony punishable by lengthy imprisonment and substantial fines.

<sup>10</sup> In addition, the Court appeared to assume that Florida law simply did not provide a pre-deprivation remedy, stating that "Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida requires taxpayers to raise their objections to the tax in a postdeprivation refund action." 496 U.S. at 38-39 (footnote omitted). In contrast, as respondents explain in their brief, Georgia law plainly provides pre-deprivation avenues for relief.

<sup>11</sup> See *Mississippi Tax Comm'n*, 412 U.S. at 368 n.11 (State "made clear \* \* \* that severe sanctions would be applied" for nonpayment of liquor tax; taxpayers would be forced to stop dispensing liquor and would have "to discontinue an entire line of business"); *Ward*, 253 U.S. at 23 (county "made it appear to the claimants that they must choose between paying the taxes and losing their lands"); *O'Connor*, 223 U.S. at 286 (taxpayer faced, in addition to accumulated penalties, the immediate prospect of "having its contracts disrupted and its business injured"); *Gaar, Scott & Co.*, 223 U.S. at 471 (nonpayment would lead to 25% penalty, cancellation of right to do business, and elimination of right to sue for relief).

See *id.* at 145-47; *O'Connor*, 223 U.S. at 286. In *Ex Parte Young*, the Court held that "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147. The Georgia penalties described by petitioner are of a different order of magnitude altogether.

Perhaps the most illuminating of these early holdings for present purposes is *Gaar, Scott & Co.*, which is cited in *McKesson* (496 U.S. at 38 n.21)—and was cited in, and decided on the same day as, *O'Connor* (223 U.S. at 286-87). There, the Court indicated that "[n]either a statute imposing a tax, *nor the execution thereunder, nor a mere demand for payment*, is treated as duress. It does not necessarily follow that there will be a levy on goods." 223 U.S. at 471 (emphasis added). On the other hand, the Court held that a taxpayer may maintain a refund action

if he pays under compulsion of a statute, whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date a penalty of twenty-five per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as duress than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back.

*Ibid.* Focusing on the interruption of the taxpayer's activities (rather than on the 25% penalty), the Court went on to hold that a taxpayer could maintain a refund action if, "under the duress of [the law's] automatically enforced provisions, [it] had paid the tax to avoid the disruption of its business." *Id.* at 472.

Taken together, these decisions plainly stand for the proposition that the accumulation of financial penalties and the simple existence of uninvoked levy provisions cannot, without more, constitute duress. Instead, the cases must be read as holding that a taxpayer is coerced to pay only when he does so to avoid an immediate sanction—seizure of property, termination or disruption of business, criminal prosecution, and the like—that is so substantial as, realistically, to give him “no choice at all.” *Mississippi Tax Comm’n*, 412 U.S. at 368 n.11. Viewed in this light, the Georgia penalties, which are relatively modest and will be collected only after final adjudication of the dispute, pose “no such imminence in the duress.” *Cuba Mail Steamship Co.*, 200 U.S. at 494. The same is true of the possibility of criminal prosecution, of a levy, or of imposition of a lien (see Pet. Br. 11-14, 16-17); petitioner here has not, and clearly could not, assert that he paid the tax “to release his person or property from detention, or to prevent an immediate seizure of his person or property.” *Railroad Co.*, 98 U.S. at 544 (citation omitted).

3. Having said this, it should be added that the older decisions addressing duress are not directly on point here. The discussion of duress in those cases did not involve procedural due process issues; instead, duress was relevant because of the rule that taxing authorities (either state or federal) had no common law obligation to refund illegal taxes that were paid voluntarily. Under this rule, voluntary payment was viewed as equivalent to a procedural default or failure to comply with a statute of limitations. See, e.g., *Gaar, Scott & Co.*, 223 U.S. at 470-71. The Court considered the question of duress in cases coming from state courts because, like any other procedural default, voluntary payment constituted an independent and adequate state ground that would preclude the exercise of federal jurisdiction. See *ibid.*; *O'Connor*, 223 U.S. at 285; *Ward*, 253 U.S. at 22-23. While the Court’s discussion of duress in these cases is suggestive here, there

is no reason to assume that the common law standard is identical to that applicable under the Constitution.

Instead, the proper inquiry should involve application of modern principles of procedural due process, of the sort that underlay the decision in *McKesson*. And on that score, the Court has made clear that “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (citation omitted). Determining whether the State’s process comports with constitutional requirements thus “will depend on appropriate accommodation of the competing interests” (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982), quoting *Goss*, 419 U.S. at 579)—private interests on the one hand and, on the other, “the Government’s interest, including the function involved and the fiscal and administrative burdens that \* \* \* additional or substitute procedural requirement[s] would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See also, e.g., *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501-504 (1993); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-45 (1985); *Logan*, 455 U.S. at 434. Indeed, the Court in *McKesson* acknowledged the applicability of this balancing approach in the tax setting. 496 U.S. at 50.

Under this inquiry, Georgia’s system plainly strikes an acceptable balance and therefore does not deny taxpayers their right to have claims heard “at a meaningful time and in a meaningful manner.” *Logan*, 455 U.S. at 437 (citations omitted). See *Mathews*, 424 U.S. at 333. On Georgia’s side of the equation, the importance of preserving penalties for late payment and summary remedies for the frivolous withholding of taxes is compelling. The Court has emphasized repeatedly (as it did in *McKesson* itself, see 496 U.S. at 37 & n.19) that the State has a paramount interest in the unimpeded collection of taxes. Yet without the penalties imposed by Georgia law, taxpayers would have every incentive *not* to pay their taxes



in a timely fashion; a refusal to pay would be cost-free (and if interest were not assessed, actually beneficial to the taxpayer).

On the other hand, Georgia taxpayers are not subjected to a penalty until their claims have run their course (unlike, for example, the liquor distributors in *McKesson*, who could have lost their licenses and been put out of business during the pendency of any pre-payment litigation), and are not penalized at all if their claims ultimately are proved meritorious. And while the Georgia penalties are not trivial, they are hardly so substantial that a taxpayer with the courage of his convictions will feel that he has no choice but to pay in advance. Compare, e.g., *Ex Parte Young*, 209 U.S. at 145-47.

The controlling standard, after all, is not whether the taxpayer's challenge is entirely worry-free; it is whether the taxpayer had a "meaningful opportunity" to obtain pre-deprivation relief. *McKesson*, 496 U.S. at 38 n.20. Modest penalties of the sort imposed by Georgia do not deny a reasonable taxpayer that opportunity. And a taxpayer can hardly claim that he paid under duress because the State could have—but *did not*—invoke a summary remedy, particularly when "nothing had been done from which [the taxing authority's] intent could be inferred to use the legal process [it] held to enforce the collection." *Railroad Co.*, 98 U.S. at 545.

#### **B. Petitioner Was Obligated To Invoke Georgia's Pre-Deprivation Remedies**

Petitioner also is wrong in contending (at Pet. Br. 17-26) that Georgia's pre-deprivation remedies are constitutionally inadequate because their availability was not clearly established at the time petitioner paid his tax. This argument is entitled to no weight; because petitioner did not pay his taxes under protest for the years at issue here, and did not otherwise indicate that he believed the Georgia tax to be unconstitutional, there is no reason to

believe that he would have made use of even the most well-settled remedies.

This point also refutes petitioner's argument (at Pet. Br. 26-29) that the Georgia Supreme Court unfairly pulled the rug out from under him by unexpectedly ruling that the refund statute is inapplicable in the circumstances of this case. Petitioner plainly did not rely on the availability of the refund statute in failing to invoke pre-deprivation remedies during tax years 1980-1988 (the period for which he now demands refunds); he failed to invoke those remedies because he did not believe at the time that the Georgia tax was unconstitutional. Indeed, when petitioner realized in March 1989 that the tax was unconstitutional, he did *not* pay the tax with the expectation that he would get it back under the refund statute; instead, he effectively invoked pre-deprivation remedies by refusing to pay the then-due portion of his 1988 tax—a portion that he never has paid. See Pet. Br. 5.

In any event, the standard of "clarity" advanced by petitioner is wrong. In *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930)—a case upon which petitioner relies (see Pet. Br. 27)—the Court held that a statute providing for pre-deprivation administrative remedies did not offer adequate relief because, at the time the taxpayer would have brought its pre-deprivation challenge, the statute had been authoritatively held by the state Supreme Court *not* to provide a remedy. See *id.* at 681-682. But the Court also made clear that "[h]ad there been no previous construction of the statute by the highest court [of the State], the plaintiff would, of course, *have had to assume the risk* that the ultimate interpretation by the highest court might differ from its own." *Id.* at 682 n.9 (emphasis added). That principle is dispositive here; by petitioner's own account, the availability of at least one of the pre-deprivation remedies was no worse than "unclear" (Pet. Br. 24) and another actually had been applied by the Georgia Supreme Court. *Id.* at 19. Petitioner plainly was obli-

gated to invoke these remedies which, as the court below has now conclusively held, were available to him.

### III. EQUITABLE CONSIDERATIONS WOULD PRECLUDE THE AWARD OF REFUNDS IN THIS CASE

Finally, even if the Court concludes that petitioner's action may proceed and that Georgia did *not* offer constitutionally adequate pre-deprivation process, the award of a refund is still not a foregone conclusion. Although petitioner wholly ignores the issue, *McKesson* expressly left open the possibility that courts retain some equitable discretion in the formulation of remedies for a due process violation. Florida had argued in that case that the good-faith reliance of its officials on a presumptively valid tax made a refund inequitable. Rather than dismiss the argument as irrelevant, the Court addressed and rejected it on the merits, stating that "even were we to assume that the State's reliance on a 'presumptively valid statute' was a relevant consideration to Florida's obligation to provide relief for its unconstitutional deprivation of property, we would disagree with the Florida court's characterization of the Liquor Tax as such a statute." 496 U.S. at 45-46. See *id.* at 50 ("the State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise").<sup>12</sup>

Since *McKesson*, the four Justices who have expressly addressed the issue have reaffirmed the view that the equities may come into play in the formulation of a remedy. Justice O'Connor, joined by Chief Justice Rehnquist, explicitly endorsed the conclusion that "[i]n a particularly compelling case \* \* \* the equities might permit a State to deny taxpayers a full refund despite having refused

<sup>12</sup> As the Court explained, "[t]he Liquor Tax reflected only cosmetic changes from [a] prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). \* \* \* The State can hardly claim surprise at the Florida courts' invalidation of the scheme." *McKesson*, 496 U.S. at 46.

them predeprivation process." *Harper*, 113 S. Ct. at 2537 (O'Connor, J., dissenting). And Justice Souter, joined by Justice Stevens, concluded in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2448 (1991), that "[n]othing we say here [prevents the State] from demonstrat[ing] reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal." <sup>13</sup>

This concern for the equities applies with special force to tax challenges—like this one—involving levies imposed prior to the Court's decision in *McKesson*. Having announced the rule that States must make either pre- or post-deprivation relief available, the *McKesson* Court reasoned that "in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available only to those taxpayers paying under protest, or enforcing relatively short statutes of limitations applicable to refund actions." 496 U.S. at 50 (emphasis added). It was thus "[t]he State's ability in the future to invoke such procedural protections [that] suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." *Id.* at 45. The Court found nothing inequitable in Florida's inability to make retroactive use of these procedural protections because its tax was clearly unconstitutional at the time of enactment. See *id.* at 46, 50.

Here, in contrast, the unfairness to the State and its citizens of requiring the payment of refunds is manifest. In our view, the decision in *Davis*, which led to the in-

<sup>13</sup> In her *Harper* dissent, Justice O'Connor suggested that the *Harper* majority might have foreclosed any appeal to the equities. See 113 S. Ct. at 2537. But it seems unlikely that *Harper* meant to go beyond what the Court had said in *McKesson*. That is particularly so because the five-Justice majority in *Harper* included Justices Stevens and Souter, who had just indicated in *Beam* that they meant to reserve the equitable question.



validation of the Georgia tax, could not have been anticipated. Two of the four Justices to address the issue in *Harper* (the Chief Justice and Justice O'Connor) concluded that *Davis* marked a sharp break in the law (see 113 S. Ct. at 2532-33 (O'Connor, J., dissenting)); another two Members of the Court believe that *Davis* was wrongly decided. See *Barker v. Kansas*, 112 S. Ct. 1619, 1626 (1992) (Stevens, J., joined by Thomas, J., concurring). And seven of the nine state courts to address the issue also concluded that the test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), does not mandate retroactive application of *Davis*. See *Harper*, 113 S. Ct. at 2515 & n.6 (citing cases). In such circumstances, "requiring refunds even when a finding of unconstitutionality would be highly unpredictable could both discourage the states from exploring new tax policies and unreasonably penalize adherence to old ones." Fallon & Meltzer, *supra*, 104 Harv. L. Rev. at 1831. This Court accordingly should preclude the award of refunds on this basis or should direct the Georgia Supreme Court, on remand, to consider the equities in formulating a remedy.

#### CONCLUSION

The judgment of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

CHARLES ROTHFELD  
MAYER, BROWN & PLATT  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 778-0616

RICHARD RUDA \*  
Chief Counsel  
STATE AND LOCAL  
LEGAL CENTER  
444 North Capitol St., N.W.  
Suite 345  
Washington, D.C. 20001  
(202) 434-4850

\* *Counsel of Record for the*  
*Amici Curiae*

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**In the  
Supreme Court of the United States**  
October Term, 1994

**CHARLES J. REICH,**  
*Petitioner,*

v.

**MARCUS E. COLLINS, et al.,**  
*Respondent.*

**On Writ of Certiorari To The  
Supreme Court of Georgia**

**BRIEF AMICUS CURIAE OF THE  
STATE OF NORTH CAROLINA  
IN SUPPORT OF RESPONDENT**

**MICHAEL F. EASLEY**  
North Carolina Attorney General

Edwin M. Speas, Jr., Senior Deputy Attorney General  
Thomas F. Moffitt\*, Special Deputy Attorney General  
Norma S. Harrell, Special Deputy Attorney General  
Marilyn R. Mudge, Assistant Attorney General

North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629  
(919)733-3786

*\*Counsel of Record*

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On Writ of Certiorari To The  
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**BRIEF AMICUS CURIAE OF THE  
STATE OF NORTH CAROLINA  
IN SUPPORT OF RESPONDENT**

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#### INTEREST OF AMICUS CURIAE

North Carolina has direct interests in the outcome of this case and, pursuant to Supreme Court Rule 37, submits this brief in support of Georgia. After this Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis*"), federal pensioners sued North Carolina to recover refunds of income taxes paid on their federal pension income for tax years prior to *Davis*. The amount of the refunds claimed was in excess of \$140,000,000, exclusive of interest. North Carolina defended against the claims on two

grounds: (1) that *Davis* should be applied prospectively only; and (2) that the federal pensioners' claims were barred by their failure to comply with North Carolina's refund statute, N.C. Gen. Stat. § 105-267, which limits refunds to those taxpayers who protest within 30 days after paying a contested tax. In its first opinion, the Supreme Court of North Carolina held that *Davis* applied prospectively only. *Swanson v. North Carolina* ("Swanson I"), 329 N.C. 576, 407 S.E.2d 791, *adhered to on rehearing*, 330 N.C. 390, 410 S.E.2d 490 (1991) ("Swanson II"). This Court granted certiorari, reversed the *Swanson* decisions, and remanded for reconsideration in light of *Harper v. Virginia Department of Taxation*, 125 L. Ed. 2d 74 (1993) ("*Harper*"). *Swanson v. North Carolina*, 125 L. Ed. 2d 713 (1993). On March 4, 1994, the Supreme Court of North Carolina held that N.C. Gen. Stat. § 105-267 met the due process requirements enunciated in *McKesson v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) and *Harper* and dismissed the refund claims of the federal pensioners for failure to comply with N.C. Gen. Stat. § 105-267's procedural requirements. *Swanson v. North Carolina* ("Swanson III"), 335 N.C. 674, 441 S.E.2d 537 (1994). North Carolina is informed that federal pensioners will petition this Court for a writ of *certiorari* to review *Swanson III* in the near future.

North Carolina recognizes that the *Reich* case involves predeprivation rather than postdeprivation remedies for *Davis* claims but is concerned that federal pensioners' arguments blur the distinctions between the two. This is not an idle concern. The *Reich* petitioners argue that the alleged inadequacy of Georgia's predeprivation remedy entitles them

to refunds, and federal pensioners in *Swanson*, relying on *Harper*, argued that the absence of any predeprivation remedy in North Carolina automatically entitled them to refunds. Unless the Court declares that the states may continue to provide either predeprivation or postdeprivation remedies to taxpayers and reiterates the constitutional principles concerning postdeprivation remedies enunciated in *McKesson*, the Court risks creation of needless uncertainty concerning tax collection in states like North Carolina that rely on postdeprivation procedures which include procedural requirements such as timely payment under protest and relatively short statutes of limitations. Thus, as *amicus curiae*, North Carolina has a compelling interest in the outcome of this case.

### SUMMARY OF ARGUMENT

North Carolina urges the Court to make clear that its analysis and holding in *Reich* do not affect the settled law relating to postdeprivation remedies set forth in *McKesson*. It is vital to North Carolina and other states that the decision in *Reich* not circumscribe the postdeprivation procedures on which they rely to protect their fiscal stability, as authorized by *McKesson* and summarized in *dicta* in *Harper*. North Carolina also urges the Court to restate unequivocally its holding in *McKesson* that states may constitutionally limit their refund liability, and thereby preserve public funds intended to benefit all their citizens; by imposing procedural conditions on recovery of refunds, e.g., by making "refunds . . . available only to those taxpayers paying under protest or



providing some other timely notice of complaint." *McKesson*, 496 U.S. at 45.

### ARGUMENT

**THIS COURT SHOULD MAKE CLEAR THAT ITS DECISION IN *REICH* DOES NOT DISTURB WELL SETTLED LAW THAT STATES MAY CONSTITUTIONALLY EMPLOY POST-DEPRIVATION REMEDIES THAT INCLUDE PROCEDURAL REQUIREMENTS THAT MUST BE MET TO OBTAIN REFUNDS, INCLUDING TIMELY PAYMENT UNDER PROTEST REQUIREMENTS.**

Petitioners argue that Georgia's predeprivation procedures are inadequate and that they are entitled to refunds for that reason. In *Swanson*, federal pensioners contended that the remedies discussion in Part III of *Harper* modified the clearly established postdeprivation law enunciated in *McKesson* such that refunds are now automatically required in the absence of an adequate predeprivation remedy -- in effect overruling a key portion of *McKesson* *sub silentio*. The *Swanson* federal pensioners reasoned that because North Carolina has no predeprivation remedies at all this Court's *dicta* in Part III of *Harper* automatically entitled them to refunds. This Court should take the opportunity presented in *Reich* to dispel such erroneous notions. The federal pensioners' arguments fly in the face of this Court's unanimous decision in *McKesson* that states may constitutionally use postdeprivation procedures in tax collection and, further, that states may constitutionally protect their financial

security by limiting their liability for refunds of taxes collected pursuant to a statute later held unconstitutional to those citizens who comply with procedural requirements, such as timely payment under protest.

*McKesson* and *Harper* were decided against the backdrop of a long line of cases holding that the specific requirements of the Due Process Clause are based on a balancing of the respective interests of affected citizens and the government. See, e.g., *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Court has long recognized that hearings are not required prior to government deprivations where a prior hearing would be inconsistent with a countervailing state interest of overriding significance. See, e.g., *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931); *Dodge v. Osborn*, 240 U.S. 118 (1916); see also, Lawrence H. Tribe, *American Constitutional Law*, § 10-14 at 720-21 (2d ed., 1988). Tax collection is such an area. In *McKesson*, this Court noted that "it is well established that a State need not provide predeprivation process for the exaction of taxes" and that postdeprivation procedures may be used "to protect government's exceedingly strong interest in financial stability" in the collection of tax. *McKesson*, 496 U.S. at 36-37.

In *Harper*, the Court relied exclusively on *McKesson*, and in *McKesson* the Court reaffirmed that the Due Process Clause does *not* require a predeprivation remedy for unconstitutional taxation and that states may fully satisfy their due process obligations to taxpayers by providing "a meaningful opportunity to secure postpayment relief for taxes already

paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson*, 496 U.S. at 22. (Emphasis added). Balancing the interests of taxpayers and the government, the Court held that states may limit taxpayers to postpayment remedies because "[a]llowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *McKesson*, 496 U.S. at 36-37. The Court again emphasized the states' fiscal needs in discussing their ability to fashion postdeprivation remedies incorporating procedural conditions designed to limit their refund liability. The Court reiterated that "States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available only to those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions . . . Such procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." *McKesson*, 496 U.S. at 50. This Court's holding in *McKesson* is clear and unambiguous: statutory preconditions to obtaining refunds, such as payment under protest provisions, do not deny due process and are constitutional. The clarity of this settled law should not be obscured by federal pensioners' assertions that lack of adequate predeprivation remedies somehow automatically entitles them to refunds.

North Carolina's refund statute, N.C. Gen. Stat. § 105-267, incorporates some of the very procedural safeguards this Court expressly identified in *McKesson*, e.g., a timely payment under protest provision and relatively short statute of limitations, that states may constitutionally use to protect their financial stability so funds will be available to provide vital public services for their citizens. N.C. Gen. Stat. § 105-267 provides that to obtain a refund of a tax whose constitutionality is challenged a taxpayer must pay the tax and protest its legality by demanding a refund within 30 days of payment. The taxpayer then has three years within which to bring suit if the Secretary of Revenue denies his or her request or takes no action within 90 days of the demand. After *Davis*, some 12,000 federal pensioners met the timely payment under protest requirement of N.C. Gen. Stat. § 105-267 and received refunds in excess of \$9,000,000; those who failed to comply were denied refunds. *Swanson III*, 335 N.C. at 682 n. 1, 441 S.E.2d at 542.

N.C. Gen. Stat. § 105-267 and its predecessor statutes have been in place for over 100 years. The Supreme Court of North Carolina has held that it is the exclusive method by which a taxpayer can challenge the constitutionality of a State tax statute and obtain a refund of taxes paid under that statute. *Swanson III*, 335 N.C. at 680, 441 S.E.2d at 541. (Applying *Harper* and *McKesson* to federal pensioners' *Davis* refund claims); *Bailey v. North Carolina*, 330 N.C. 227, 235, 412 S.E.2d 295, 300 (1991), *cert. denied*, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992) (Applying N.C. Gen. Stat. § 105-267 to deny claims of State pensioners that taxation of their retirement benefits pursuant



to a statute equalizing the tax treatment of State and federal pension income following *Davis* violated their constitutional rights). See also, *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977) (N.C. Gen. Stat. § 105-267 held to be the exclusive method to challenge the constitutionality of a State tax statute and failure to meet its requirements bars refund claim); *Kirkpatrick v. Currie*, 250 N.C. 213, 108 S.E.2d 209 (1959) (N.C. Gen. Stat. § 105-267 accords taxpayer due process of law and is constitutional); *Richmond & Danville R.R. Co. v. Reidsville*, 109 N.C. 494, 13 S.E. 865 (1891) (Failure to demand refund of tax within 30 days of payment pursuant to predecessor statute to N.C. Gen. Stat. § 105-267 bars claim for refund of tax collected pursuant to an allegedly unconstitutional statute).

It is extremely important that the Court make clear in *Reich*, as it did in *McKesson*, that states retain the flexibility to adopt postdeprivation remedies such as N.C. Gen. Stat. § 105-267. This flexibility is essential to the states' ability to provide public services to all citizens without fear of devastating and unpredictable revenue shortfalls occasioned by the refund of taxes collected in good faith reliance on presumptively valid state tax statutes. The public good will not be served if through inadvertence or lack of clarity the states' ability to meet the needs of all citizens is undermined or circumscribed in the Court's decision in *Reich*.

### CONCLUSION

North Carolina urges the Court to make clear that its decision in *Reich* does not affect the settled law relating to

postdeprivation remedies set forth in *McKesson*. North Carolina further requests the Court to reiterate its prior holdings that states may constitutionally use postdeprivation as well as predeprivation procedures in collection of taxes and that postdeprivation remedies may include procedural conditions such as timely payment under protest and relatively short statutes of limitation.

Respectfully submitted, this the 24th day of May, 1994.

Michael F. Easley  
Attorney General

Edwin M. Speas, Jr.  
Senior Deputy Attorney General

Thomas F. Moffitt\*  
Special Deputy Attorney General

Norma Harrell  
Special Deputy Attorney General

Marilyn R. Mudge  
Assistant Attorney General

N.C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602

Telephone: (919) 733-3786

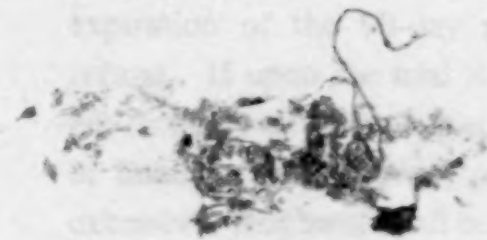
\*Counsel of Record

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## APPENDIX

### CONTENTS OF APPENDIX

N.C. Gen. Stat. § 105-267 . . . . . 1a





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**§ 105-267. Taxes to be paid; suits for recovery of taxes.**

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10; 1977, c. 946, s. 1.)